The Supreme Court of South Carolina

RE: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(2), SCACR, since April 1, 2012. This list is being published pursuant to Rule 419(d)(2), SCACR. If these lawyers are not reinstated by the Commission by June 1, 2012, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(2), SCACR.

Columbia, South Carolina
May 3, 2012

LAWYERS SUSPENDED FOR NON-COMPLIANCE
WITH MCLE REGULATIONS FOR THE
2011-2012 REPORTING PERIOD
AS OF MAY 2, 2012

Nancy B. Alston
PO Box 446
Irmo, SC 29063

J. Reid Anderegg
PO Box 73129
North Charleston, SC 29415

James R. Berry
PO Box 186
Cottageville, SC 29435

William A. Boyd
302 Main Street
Andrews, SC 29510
INTERIM SUSPENSION (7/14/11)

James Michael Brown
102 Greenbow Court
Columbia, SC 29212
INTERIM SUSPENSION (4/13/11)

E. W. Cromartie II
PO Box 8417
Columbia, SC 29202
INTERIM SUSPENSION (3/9/10)

Mark F. Dahle
PO Box 6629
Lakeland, FL 33807
ONE YEAR SUSPENSION (7/25/11)

Eric J. Davidson
1800 North Charles Street, Suite 400
Baltimore, MD 21201

Margaret L. Drake
3722 Heyward Street
Columbia, SC 29205

Douglas F. Gay
PO Box 10506
Rock Hill, SC 29731
INTERIM SUSPENSION (1/13/12)

Donna S. Givens
125 Misty Oaks Place
Lexington, SC 29072
9-MONTH SUSPENSION (2/7/11)

Chad B. Hatley
PO Box 51
North Myrtle Beach, SC 29597
INTERIM SUSPENSION (9/28/11)

Christopher M. Hill
2672 Bayonne Avenue
Sullivan's Island, SC 29482
SUSPENDED BY SC BAR (2/1/12)

Christine A. Hofmann
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St. Augustine, FL 32080

Gary D. James, Sr.
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INTERIM SUSPENSION (11/15/11)

J. Keith Jones
128 South Tryon Street, Suite 1800
Charlotte, NC 28202

Robert J. Klug, Sr.
1558 Chalk Avenue
Blue Bell, PA 19422

George K. Macklin
150 Cartright Street
Charleston, SC 29492
SUSPENDED BY SC BAR (2/1/12)

Wilton Darnell Newton
PO Box 887
Easley, SC 29641
INTERIM SUSPENSION (11/17/11)

Anthony C. Odom
262 Eastgate Drive, PMB 185
Aiken, SC 29803
INTERIM SUSPENSION (5/17/06)

Alice Jefferies Perkins
PO Box 3527
West Columbia, SC 29169

Michael J. Pitch
PO Box 11332
Columbia, SC 29211
SUSPENDED BY SC BAR (2/1/12)

Richard J. Raeon
253 de la Gaye Point
Beaufort, SC 29902
SUSPENDED BY SC BAR (2/1/12)

Christopher B. Roberts
100 Whitsett Street
Greenville, SC 29601
INTERIM SUSPENSION (9/24/10)

Sara Jayne Rogers
347 Southport Drive
Summerville, SC 29483
INTERIM SUSPENSION (12/9/11)

Chavvah P. Sanders
4500 Bowling Boulevard, Suite 200
Louisville, KY 40207

Michael D. Shavo
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Columbia, SC 29205
INTERIM SUSPENSION (9/22/09)

Paul K. Simons, Jr.
111 Park Avenue, SW
Aiken, SC 29801

Jeffery Glenn Smith
171 Church Street, Suite 160
Charleston, SC 29401
INTERIM SUSPENSION (1/13/12)

James H. Swick
1421 Bull Street
Columbia, SC 29201
SUSPENDED BY SC BAR (2/1/12)

Andrea L. Taylor
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Mt. Pleasant, SC 29466
SUSPENDED BY SC BAR (2/1/12)

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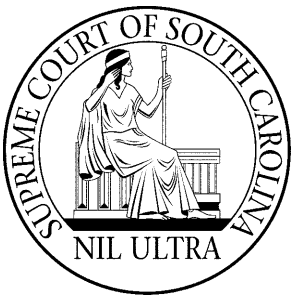
Midland, NC 28107
SUSPENDED BY SC BAR (2/1/12)

Ted W. Wooten III
8205 Dunwoody Place, Building 19
Atlanta, GA 30350



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
May 9, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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Michael Anderson and Robert Barger, Plaintiffs,

v.

South Carolina Election Commission; Marci Andino, as Executive Director and as a representative of the South Carolina State Election Commission; South Carolina Democratic Party; Richard A. Harpootlian, as Chair of the Executive Committee of and as a representative of the South Carolina Democratic Party; South Carolina Republican Party; Chad Connelly, as Chair of the Executive Committee of and as a representative of the South Carolina Republican Party; Lexington County Commission of Registration and Elections; Dean Crepes, as Director of and as a representative of the Lexington County Commission of Registration and Elections; Lexington County Democratic Party; Kathy Hensley, as Chair of and as a representative of the Lexington County Democratic Party; Lexington County Republican Party; Steven Isom, as Chair of and a representative

of the Executive Committee of
the Lexington County
Republican Party, Defendants.

ORDER

This Court was asked to issue a declaratory judgment in its original jurisdiction to construe S.C. Code Ann. § 8-13-1356 (Supp. 2011). We have issued our opinion, and the parties now ask the Court to reconsider this matter and clarify the opinion. In addition, the Sumter County Democratic Party asks the Court for permission to file an amicus curiae brief.

The request by Sumter County Democratic Party for permission to file an amicus curiae brief is denied.

Our opinion in *Anderson v. S.C. Election Comm'n*, Op. No. 27120 (S.C. Sup. Ct. filed May 2, 2012), speaks for itself and stands as written. Accordingly, we deny the request for rehearing.

As to the request for clarification, the parties' contention that our opinion holds § 8-13-1356 is satisfied if an individual, when filing a Statement of Intention of Candidacy (SIC), provides the political party with a paper copy of a Statement of Economic Interest (SEI), whether previously electronically filed or not, is correct. However, we reject the parties' contention that our opinion allows compliance with the statute in any other fashion.

We direct the parties to file with the State Election Commission or the appropriate county election commission, by noon on May 4, 2012, a list of candidates who complied with § 8-13-1356 as the statute is written and as has been interpreted by this Court.

s/ Costa M. Pleicones A.C. J.
FOR THE COURT

Columbia, South Carolina
May 3, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Anderson and Robert Barger, Plaintiffs,

v.

South Carolina Election Commission; Marci Andino, as Executive Director and as a representative of the South Carolina State Election Commission; South Carolina Democratic Party; Richard A. Harpootlian, as Chair of the Executive Committee of and as a representative of the South Carolina Democratic Party; South Carolina Republican Party; Chad Connelly, as Chair of the Executive Committee of and as a representative of the South Carolina Republican Party; Lexington County Commission of Registration and Elections; Dean Crepes, as Director of and as a representative of the Lexington County Commission of Registration and Elections; Lexington County Democratic Party; Kathy Hensley, as Chair of and as a representative of the Lexington County Democratic Party; Lexington County Republican Party; Steven Isom, as Chair of and a representative of the Executive Committee of the Lexington County Republican Party, Defendants.

Appellate Case No. 2012-211366

Opinion No. 27120
Heard May 1, 2012 – Filed May 2, 2012

JUDGMENT FOR PLAINTIFFS

Tracey Colton Green and Benjamin Parker Mustian, of Willoughby & Hoefer, PA, of Columbia, for Plaintiffs.

M. Elizabeth Crum, Ariail B. Kirk, and Amber B. Martella, all of McNair Law Firm, PA, of Columbia, for Defendants South Carolina State Election Commission and Marci Andino; Richard A. Harpootlian and Christopher P. Kenney, both of Richard A. Harpootlian, PA, of Columbia, for Defendants South Carolina Democratic Party, Richard A. Harpootlian, Lexington County Democratic Party, and Kathy Hensley; Kevin A. Hall, Karl S. Bowers, Jr., and M. Todd Carroll, all of Womble Carlyle Sandridge & Rice, LLP, of Columbia, for Defendants South Carolina Republican Party, Chad Connelly, Lexington County Republican Party, and Steven Isom; Jeffrey M. Anderson, of Davis, Frawley, Anderson, McCauley, Ayer, Fisher & Smith, LLC, of Lexington, for Defendants Lexington County Commission of Registration and Elections and Dean Crepes.

PER CURIAM: This is a matter in the Court's original jurisdiction seeking declaratory relief in connection with a dispute as to the requirements for a candidate's name to properly appear on a primary election ballot. We are asked to construe the meaning of S.C. Code Ann. § 8-13-1356 (Supp. 2011), which provides that "[a] candidate must file a statement of economic interests for the preceding calendar year at the same time and with the same official with whom the candidate files a declaration of candidacy or petition for nomination." Under longstanding rules of statutory construction, we find the statute means what it says. Accordingly, we grant declaratory relief to plaintiffs.

We grant declaratory relief as follows: (1) that individuals not exempt who are seeking nomination by political party primary to be a candidate for office must file a Statement of Economic Interest (SEI) at the same time and with the same official with whom the individuals file a Statement of Intention of Candidacy (SIC); (2) that an official authorized to receive SICs may not accept the forms unless they are accompanied by an SEI; (3) that an individual who did not file an SEI at the same time and with the same official with whom the individual filed an SIC should not appear on the party primary election ballot or the general election ballot; and (4)

that the Lexington County Democratic Party, the Lexington County Republican Party, the South Carolina Democratic Party, and the South Carolina Republican Party (political parties) unlawfully certified individuals seeking nomination by political party primary who did not file an SEI at the same time and with the same official with whom the individual filed an SIC.

The State Election Commission and the Lexington County Commission of Registration and Elections have filed cross-claims asking that the political parties: (1) provide the State Election Commission and the appropriate county election commissions by May 4, 2012 with a list of certified candidates who filed an SEI at the same time and with the same official with whom they filed an SIC; and (2) reimburse the State Election Commission and the appropriate county election commissions for the additional costs which will be incurred in revising the ballot databases and audio files to reflect the corrected list of certified candidates. We grant relief as to the May 4, 2012 deadline but decline to resolve the requests for costs at this time.

SUBJECT MATTER JURISDICTION

The Republican Party claims this Court lacks subject matter jurisdiction over the legislative races because the General Assembly has exclusive authority over disputes involving legislative elections. South Carolina Const. art. III, § 11 provides, "Each house shall judge of the election returns and qualifications of its own members." Accordingly, this Court has declined to opine on issues where the Constitution delegates authority to the General Assembly. *South Carolina Public Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 632 S.E.2d 277 (2006). Here we are not asked to judge a disputed legislative election but rather to interpret a statute. The construction of a statute is a judicial function and responsibility. *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 614 S.E.2d 629 (2005). Accordingly, we reject the argument that this Court lacks subject matter jurisdiction in this case.

JUSTICIABILITY

There is a question of whether this dispute is ripe for review, as no harm has been incurred because an unqualified candidate has not been elected. This issue is ripe for judicial determination. Absent relief, plaintiffs, as voters, face the substantial likelihood that they will be presented with a slate of candidates, of whom one or

more may not be certified after the election. This is a matter of great public importance. Integrity in elections is foundational. It is that recognition of the importance of the integrity of public elections that leads us to grant relief at this time. We acknowledge that S.C. Code Ann. § 8-13-1356(E) (Supp. 2011) contemplates a post-primary election remedy prohibiting a person whose name inadvertently appears on the ballot from being certified as a candidate for the general election. However, we discern no legislative intent that such remedy is exclusive. Where there exists the substantial likelihood that the respective political parties have erroneously certified candidates for inclusion on the primary ballot, by requiring compliance with the law now, we avoid the greater chaos and multiple challenges that would inevitably follow the party primary elections. Moreover, § 8-13-1356(E) envisions only the occasional situation where "the candidate's name **inadvertently** appears on the ballot …" (emphasis added). We are confronted not with the prospect of a single candidate's name appearing on a ballot "inadvertently," but with systemic failure of the political parties to follow the law. The effect of the political parties ignoring their statutory gatekeeping role is the prospect of the inclusion of many candidates on the ballot who did not comply with the statutory requirements. Accordingly, we grant relief to require compliance with the law and ensure that only legally qualified candidates are included on the ballots.

STATUTORY CONSTRUCTION

The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Beaufort Cnty. v. S.C. State Election Comm'n,* 395 S.C. 366, 718 S.E.2d 432 (2011). In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. *Id.*; *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *Mid–State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 476 S.E.2d 690 (1996*).* When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Id.*

South Carolina Code Ann. § 8-13-1356(B) states a non-exempt candidate must file an SEI for the preceding calendar year "at the same time and with the same official with whom the candidate files a declaration of candidacy or petition for

nomination." To comply with that section, an individual must file an SEI with the appropriate political party. Section 8-13-1356(E) provides that an officer authorized to receive declarations of candidacy and petitions for nominations may not accept an SIC unless it is accompanied by an SEI.

Section 8-13-1356(B) unambiguously mandates that an individual file an SEI at the same time and with the same official with whom the individual files an SIC. This requirement is buttressed by the unambiguous prohibition against a political party accepting an SIC unless it is accompanied by an SEI.

We reject the argument of the South Carolina Republican Party that S.C. Code Ann. § 7-11-15(3) (Supp. 2011), which provides that an individual's name must appear on the ballot if the individual produces a signed and dated copy of a timely filed SIC, is irreconcilably in conflict with § 8-13-1356. Instead, we hold, as recognized by the remaining parties in this action, that these two statutes may be harmonized. Section 7-11-15(3) sets forth the requirements for an individual's name to appear on the ballot "except as otherwise provided by law." Section 8-13-1356(E) expressly references Chapter 11 of Title 7 and prohibits a political party from accepting an SIC for filing if it is not accompanied by an SEI. Therefore, an individual who fails to provide an SEI to the political party when filing an SIC would not have a timely filed SIC. We decline to ignore the "except as otherwise provided by law" language of § 7-11-15(3) and the clear mandate the General Assembly imposed in § 8-13-1356(E) when the statutes are easily reconciled.

The Democratic Party additionally directs our attention to S.C. Code Ann. §8-13-365 (Supp. 2011), requiring that the SEI be filed electronically, which is done on the State Ethics Commission's website. However, this statute is not part of the process that qualifies an individual for inclusion on the ballot. Similarly, while S.C. Code Ann. § 8-13-1170(B) (Supp. 2011) provides that extensions of time for electronic filing of an SEI with the State Ethics Commission may be granted, that also does not concern ballot requirements. Accordingly, we reject the argument by the Democratic Party that the requirement of § 8-13-1356(B) may be alternatively satisfied by filing an SEI electronically with the State Ethics Commission. Filing an SEI with the State Ethics Commission cannot excuse noncompliance with § 8-13-1356(B).

The Republican Party contends that § 8-13-1356 impermissibly adds qualifications for an individual to serve in the General Assembly. In particular, it argues that

S.C. Const. art. III, § 7 sets forth the only qualifications for service, and § 8-13-1356, therefore, cannot raise the bar. However, § 8-13-1356 does not alter the qualifications for one to serve as a legislator. Instead, it merely delineates filing requirements to appear on a ballot. We, therefore, reject this argument.

Because the statutes at issue, when given their plain and ordinary meaning, can each be given effect without doing harm to the other, "the rules of statutory interpretation are not needed and the [C]ourt has no right to impose another meaning." *See Hodges v. Rainey*, *supra.* We hold the unambiguous language and expression of legislative intent of § 8-13-1356(B) and (E) require an individual to file an SEI at the same time and with the same official with whom an SIC is filed, and prohibit political party officials from accepting an SIC which is not accompanied by an SEI. Accordingly, the names of any non-exempt individuals who did not file with the appropriate political party an SEI simultaneously with an SIC were improperly placed on the party primary ballots and must be removed. We direct the appropriate official of the political parties to file with the State Election Commission or the appropriate county election commission, by noon on May 4, 2012, a list of only those non-exempt candidates who simultaneously filed an SEI and an SIC as required by § 8-13-1356(B). This Court's injunction issued April 20, 2012, is hereby lifted.

We fully appreciate the consequences of our decision, as lives have been disrupted and political aspirations put on hold. However, the conduct of the political parties in their failure to follow the clear and unmistakable directives of the General Assembly has brought us to this point. Sidestepping the issue now would only delay the inevitable.

In order to expedite a resolution of this matter of public importance, we do not reach the cross-claims of the State Election Commission and the Lexington County Commission of Registration and Elections for reimbursement of the costs of revisions to the ballot databases and audio files. This is without prejudice to the right of the commissions to resubmit requests for reimbursement once the applicable costs are known and ascertained.

Finally, while a petition for rehearing is normally due within fifteen days after the filing of an opinion under Rule 221(a), SCACR, because of the urgency of this matter, any petition for rehearing must be received by this Court by 10:00 a.m. on May 3, 2012.

JUDGMENT FOR PLAINTIFFS.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Christopher Blakeslee Roberts, Respondent.

Opinion No. 27121
Submitted March 26, 2012 – Filed May 9, 2012

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Peter D. Protopapas, of Rikard & Protopapas, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR, with the following conditions: 1) payment of costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline; 2) completion of the Legal Ethics and Practice Program Ethics School prior to reinstatement; and 3) full compliance with the terms of his monitoring contract with Lawyers Helping Lawyers and, within thirty (30) days of completion of the contract, submission of an affidavit to the Commission attesting to

the contract's completion. We accept the agreement and disbar respondent from the practice of law in this state, retroactive to September 24, 2010, the date of his interim suspension. In the Matter of Roberts, 390 S.C. 56, 700 S.E.2d 250 (2010). In addition, we impose each of the conditions listed above. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

A corporate client asked respondent to begin a collection action against another company due to the company's failure to perform on its debt obligation to respondent's corporate client. Respondent contacted a West Virginia law firm to perfect the mortgage and bring foreclosure proceedings against the company.

In June of 2004, the West Virginia law firm asked respondent to produce a copy of the demand letter that respondent had issued to the company in 2003. An email was sent from respondent's office which contained an attached demand letter dated February 5, 2003, to the law firm handling the foreclosure action.

In 2007, respondent's corporate client sued respondent for legal malpractice. During the course of the malpractice action, the client discovered that the metadata attached to the February 5, 2003, letter that respondent emailed to the West Virginia law firm indicated that the letter was actually created in June of 2004. In addition, the alleged recipients of the February 5, 2003, letter testified that they did not receive a copy of the letter in 2003. Respondent denies creating the June 2004 document, but acknowledges that the document was created under his supervision although not at his direction. Respondent self-reported these allegations to the Commission.

Matter II

Respondent was one of five people on the Chanticleer Tax District Commission (Tax District). After the previous treasurer resigned, control of the funds for the Tax District became respondent's responsibility. As part of this responsibility, respondent processed and paid the Tax District's bills.

While in control of the funds for the Tax District, respondent used approximately $40,000.00 of the Tax District's funds for his personal use. When confronted with the issue, respondent repaid the funds, turned over the bank account information, removed himself from the accounts, and resigned his position. Respondent asserts he was suffering from major alcohol and depression issues at the time of the misappropriation of funds.

Matter III

In 2008, respondent was retained by a North Carolina trucking company to assist with several legal matters pending in South Carolina. Complainant is the senior vice president and managing agent for the trucking company. Respondent failed to keep Complainant reasonably informed about the status of Complainant's case, failed to promptly comply with the Complainant's reasonable requests for information, and failed to appear at a scheduled hearing on August 24, 2010. The court granted a continuance due to respondent's failure to appear. Respondent represents he failed to appear at the scheduled hearing due to his involuntary commitment for the treatment of alcoholism on August 22, 2010. Respondent admits he failed to withdraw from representation when his alcoholism began to impair his ability to competently represent Complainant's company.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule

407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.16 (lawyer shall withdraw from representation when lawyer's physical or mental condition materially impairs the lawyer's ability to represent client); Rule 5.3 (lawyer having direct supervisory authority over non-lawyer employee shall make reasonable efforts to ensure that the person's conduct is compatible with professional obligations of lawyer); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent, retroactive to the date of his interim suspension. In addition, respondent shall: 1) pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this order; 2) complete the Legal Ethics and Practice Program Ethics School prior to reinstatement; and 3) fully comply with the terms of his monitoring contract with Lawyers Helping Lawyers and, within thirty (30) days of completion of the contract, submit an affidavit to the Commission attesting to the contract's completion.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Zeb Eron Binnarr, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 27122
Heard December 1, 2011 – Filed May 9, 2012

REVERSED

H. Stanley Feldman, of Charleston, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., of Columbia, Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

JUSTICE BEATTY: Zeb Eron Binnarr ("Petitioner") was convicted by a jury for failing to timely register as a sex offender pursuant to section 23-3-460[1] of the South Carolina Code. Petitioner appealed his conviction primarily on the ground that he did not receive actual notice of a change in the law regarding sex offender registration requirements. The Court of Appeals affirmed Petitioner's conviction. State v. Binnarr, Op. No. 2010-UP-077 (S.C. Ct. App. filed Feb. 2, 2010). This Court granted Petitioner's request for a writ of certiorari to review the decision of the Court of Appeals. We reverse.

I. Factual/Procedural History

In 2002, Petitioner was convicted of criminal sexual conduct in the third degree. As a result of this conviction, Petitioner was required to register annually as a sex offender by the Sex Offender Registry Act.[2] In February 2006, Petitioner registered with the Charleston County Sheriff's Office and, in turn, was given a form to sign stating he understood that he was required to register again the following year in February 2007.

On July 1, 2006, section 23-3-460 was amended to require sex offenders to register biannually.[3] Due to this amendment, Petitioner was required to register again in August 2006, which was six months after his

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[1] S.C. Code Ann. § 23-3-460(A) (Supp. 2011).

[2] S.C. Code Ann. §§ 23-3-400 to -555 (2007 & Supp. 2011).

[3] Section 23-3-460 provides in pertinent part:

> A person required to register pursuant to this article is required to register biannually for life. For purposes of this article, "biannually" means each year during the month of his birthday and again during the sixth month following his birth month.

S.C. Code Ann. § 23-3-460(A) (Supp. 2011) (amended pursuant to Act No. 342, 2006 S.C. Acts 2708).

birth month. When Petitioner failed to register in August 2006, he was arrested in March 2007 and indicted pursuant to section 23-3-470.[4]

During Petitioner's jury trial, the State called Detective Denise Catlett of the Charleston County Sheriff's Office, who testified that she managed the county's sex offender registry. Catlett testified she was responsible for notifying sex offenders of the change in the law in 2006. According to Catlett, the change in the law was "all over the news" and "in the newspaper" for months preceding and after July 2006. Catlett testified she took additional steps to notify sex offenders of the change in the law by mailing letters to sex offenders at their address on file, which sex offenders were required to keep current,[5] informing them of the new law and the requirement to re-register.

Catlett stated that, after the law changed and sex offenders failed to appear for the biannual registration, a certified letter was sent to the address on file for the sex offender. Catlett testified that Petitioner was mailed a letter to his address on file regarding the new registration requirements.[6] This letter, which was mailed via regular mail, was not returned. When Petitioner failed to appear to re-register, the sheriff's office mailed a certified letter to him. Catlett confirmed that this letter was never picked up and was returned to the Charleston County Sheriff's Office after three attempted deliveries by the Postal Service. Catlett admitted that Petitioner may not have received either letter prior to his required registration date in August

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[4] S.C. Code Ann. § 23-3-470(A) (2007) ("It is the duty of the offender to contact the sheriff in order to register . . . . If an offender fails to register . . . he must be punished as provided in subsection (B).").

[5] S.C. Code Ann. § 23-3-460 (2007) (providing that a sex offender must send written notice to the appropriate sheriff's office of any change of address within ten days of establishing a new residence).

[6] Catlett stated that she "generally" mailed out the letters the month before a sex offender was required to register; for example, if a person was required to register in August, he would receive a letter around July 10th.

2006. She stated, however, that she waited until January 14, 2007 to sign an arrest warrant for Petitioner.

At the conclusion of the State's case, Petitioner's counsel moved for a directed verdict. In his argument, counsel cited Lambert v. People of the State of California, 355 U.S. 225 (1957),[7] for the proposition that Petitioner was entitled to actual notice of the change in the law in order to comply with Petitioner's due process rights. Although the indictment for the offense alleged notice was given prior to Petitioner's registration date,[8] counsel claimed the State had failed to present evidence that it provided Petitioner with actual notice of the change in the law.

In response, the State asserted it was Petitioner's responsibility to maintain a current address with the Charleston County Sheriff's Office. Based on the language of the statute, the State claimed "[t]here was no duty for notification" and that the letters were mailed as a "courtesy." The State contended it satisfied any burden of notification by mailing a letter to Petitioner's last known address and noted that this letter was not returned to the sheriff's office.

The trial judge denied Petitioner's motion for a directed verdict. Although the judge recognized that the statute did not "mention the notification requirement," he rejected any contention that it was a "law of strict liability." Despite the absence of statutory language, the judge found

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[7] In Lambert, the defendant was convicted of violating the Los Angeles felon registration ordinance. On appeal, the United States Supreme Court ("USSC") reversed her conviction on the ground the registration provisions violated due process when applied to a person who had no actual knowledge of the duty to register. Although the Court recognized the well-established principle that ignorance of the law is no excuse, it refused to implement such principle except where it could be shown that the person had knowledge of the duty to register or a showing was made of the probability of such knowledge. Lambert, 355 U.S. at 227-29.

[8] The indictment charged Petitioner with failing to register as a sex offender on or about August 18, 2006 "after being instructed to do so."

the "Sheriff's Department undertook to give some notice." Because there was circumstantial evidence the sheriff's office provided notice to Petitioner of the registration requirement, the judge ruled that whether Petitioner had notice of the change in the law was an issue for the jury.

Following the judge's ruling, defense counsel called Petitioner as a witness. Petitioner testified he did not receive any notice of the change in the law that required him to re-register in August 2006 rather than February 2007. Petitioner also denied receiving any of the letters sent by Catlett; however, he confirmed he lived at the address on file with the Charleston County Sheriff's Office and that he was living at that address in 2006.

After closing arguments, the judge charged the jury, in part, by explaining the text of section 23-3-460 and the 2006 amendment to that statute. In outlining the elements of the offense, the judge relied on language in Lambert, stating:

> The question is whether or not [Petitioner] had actual knowledge or should have had knowledge of the requirement to register in this particular case, because you must find beyond a reasonable doubt that the State has proven that [Petitioner] had actual knowledge of the duty to register or that the State has proven beyond a reasonable doubt that [Petitioner] had the probability of such knowledge.
>
> If the State fails to convince you beyond a reasonable doubt that he knew of his duty to register bi-annually or that they failed to convince you of the probability of that knowledge, then it has failed to meet its burden of proof in this case because the law requires either actual knowledge of the duty to register or proof of the probability of such knowledge and the subsequent failure to comply in order to meet the burden of proof which is upon the State. (Emphasis added.)

The judge further explained that in order to "constitute a crime an act has to be accompanied by some criminal intent . . . [a]nd in this particular case . . .

knowledge is the element that is required, either actual knowledge or the probability of such knowledge."

Ultimately, the jury convicted Petitioner of the charged offense and the trial judge sentenced Petitioner to the statutorily-mandated term of ninety days in jail.[9]

Petitioner appealed his conviction to the Court of Appeals. On appeal, Petitioner asserted the trial judge erred in: (1) finding, as a matter of law, that section 23-3-460 did not contain a notice requirement as the lack of a notice requirement violated Petitioner's procedural due process rights; (2) failing to apply the notice requirements contained in section 23-3-440[10] to section 23-3-460; and (3) denying the motion for directed verdict given there was no evidence presented that Petitioner received notification of the new registration requirement.

The Court of Appeals affirmed Petitioner's conviction. State v. Binnarr, Op. No. 2010-UP-077 (S.C. Ct. App. filed Feb. 2, 2010). In so ruling, the court specifically found the Legislature did not include language in section 23-3-460 requiring the State to notify sex offenders about the change in the registration requirements when it amended the statute in 2006. The court declined to apply the notification requirement of section 23-3-440 into section 23-3-460, finding a clear reading of that statute "reveals the statute only requires the State to give notice of the registration requirement to a sex offender within one day of the sex offender's release from prison." Id., slip op. at 1.

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[9] In 2006, one convicted of a first offense for failing to register by the deadline was subject to a mandatory term of ninety days' imprisonment. S.C. Code Ann. § 23-3-470(B)(1) (2007).

[10] Section 23-3-440 provides that before an offender is released from custody or placed on parole, "[t]he Department of Corrections . . . shall provide verbal and written notification to the offender that he must register with the sheriff of the county in which he intends to reside within one business day of his release." S.C. Code Ann. § 23-3-440(1) (2007).

Additionally, the court found section 23-3-460 did not violate Petitioner's procedural due process rights. Citing State v. Edwards, 302 S.C. 492, 397 S.E.2d 88 (1990),[11] the court noted the new, biannual registration requirement became effective one month before Petitioner was required to register with the sheriff's office. Thus, the court concluded that Petitioner had "fair notice that the failure to register on a biannual basis could result in a crime." Id., slip op. at 2. The court further found the sheriff's office provided fair notice to Petitioner of the new registration requirements when it mailed a blanket notice and a certified letter to Petitioner's residence. Id.

Following the denial of his Petitions for Rehearing and Rehearing En Banc, Petitioner sought a writ of certiorari for this Court to review the decision of the Court of Appeals. This Court granted the petition.

II. Discussion

Petitioner asserts the Court of Appeals erred in holding that he was not entitled to actual notice of a change in the law regarding his registration as a sex offender. Petitioner claims the notice requirement is central to the Sex Offender Registry statutes and, thus, the failure to provide him with actual notice of the 2006 amendment to section 23-3-460 violated his rights to due process and equal protection.

In support of this contention, Petitioner notes that in February 2006 the Charleston County Sheriff's Office gave him "written, hand delivered notice

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[11] In Edwards, the defendant was convicted of DUI and sentenced as a second offender based on a 1988 amendment that extended the time period in which prior DUI convictions could be considered in determining the penalty for subsequent DUI convictions. Edwards, 302 S.C. at 493, 397 S.E.2d at 89. On appeal, this Court considered whether the amendment violated the due process rights of Edwards because he did not receive notice of the change in the law. Id. at 494, 397 S.E.2d at 89. This Court concluded that, "[b]ecause the current offense took place after the effective date of the amendment, appellant clearly had notice that his 1983 conviction would be considered in determining his punishment for the current offense." Id. Accordingly, this Court found no violation of due process. Id. at 494, 397 S.E.2d at 89-90.

that his next registration would occur in February 2007." Because the sheriff's office provided him with these explicit instructions, Petitioner claims he did not have "fair notice" of the new registration date as he was misled regarding the correct date. In order to comply with this principle of "fair notice," Petitioner asserts that more was required than a simple recognition of the fact that the new law went into effect one month before he was required to register. At oral argument, Petitioner claimed he was entitled to in-person, written notification.

Recently, we addressed this precise question in State v. Latimore, Op. No. 27102 (S.C. Sup. Ct. filed Mar. 14, 2012) (Shearouse Adv. Sh. No. 10 at 17). In Latimore, we held that "to satisfy due process a convicted sex offender must have actual notice of the 2006 change to section 23-3-460, which imposed an additional registration requirement, to be convicted of violating section 23-3-470 of the South Carolina Code." Id., slip op. at 21. Thus, based on Latimore, we agree with Petitioner that the Court of Appeals erred in declining to recognize that a defendant must have actual notice of the reporting requirements before he can be convicted of violating section 23-3-470. We find this error in conjunction with the lack of direct or substantial circumstantial evidence that Petitioner had actual notice of the change in the law warrants the reversal of Petitioner's conviction.

In denying Petitioner's motion for a directed verdict, the judge specifically rejected any contention that the statute was a "strict liability law." As evidenced by his comments, it is clear the judge agreed with Petitioner's claim regarding his entitlement to actual notice of his duty to re-register. Although the judge's ruling was based on a correct interpretation of the law, i.e. that actual notice was required, our analysis is not concluded as the question becomes whether the State presented sufficient evidence to withstand Petitioner's motion for a directed verdict.

"A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state." Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of

the accused, the Court must find the case was properly submitted to the jury." Id. at 292-93, 625 S.E.2d at 648.

Vital to our assessment of the sufficiency of the evidence are the provisions of our state and federal Due Process Clauses, which provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. S.C. Dep't of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). Accordingly, a claim of denial of due process must be analyzed with a two-part inquiry: (1) whether the interest involved can be defined as "liberty" or "property" within the meaning of the Due Process Clause; and, if so (2) what process is due in the circumstances. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571-73 (1972).

Here, Petitioner was subject to a ninety-day mandatory term of imprisonment for failing to register. Without question, imprisonment is recognized as one of the greatest deprivations of liberty. As our United States Supreme Court has explained:

> Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. Youngberg v. Romeo, 457 U.S. 307, 316, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982). "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Jones, supra, 463 U.S. at 361, 103 S.Ct. at 3048 (internal quotation marks omitted). We have always been careful not to "minimize the importance

> and fundamental nature" of the individual's right to liberty. Salerno, supra, 481 U.S. at 750, 107 S.Ct. at 2103.

Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

With these principles in mind, we find the State failed to produce any direct or substantial circumstantial evidence from which a jury could determine that Petitioner received actual notice of his duty to re-register. Because Petitioner denied receiving any letters from the Charleston County Sheriff's Office regarding the biannual re-registration requirement, there is no direct evidence of actual notice.

In terms of circumstantial evidence, the State presented Detective Denise Catlett as its only witness who testified that she "generally" sent letters via first-class mail to the more than 800 registered sex offenders in Charleston County, and that the letter addressed to Petitioner was not returned as undeliverable. She further testified the certified letter mailed to Petitioner regarding his failure to appear to re-register was returned to the Charleston County Sheriff's Office as unclaimed. Significantly, Catlett acknowledged that Petitioner may not have received either letter prior to his required registration date in August 2006.

We also note the State failed to produce a copy of the actual letter but, instead, simply relied on Catlett's testimony that she, as a matter of practice, mailed these form letters out on the tenth of the month preceding the re-registration deadline. Without a copy of the letter, there was no evidence that the letter had been properly printed, addressed, and mailed to Petitioner. See 58 Am. Jur. 2d Notice § 43 (2002) ("It is not sufficient to assert that the general custom of one's office is to mail all letters. Proof of actual mailing or of an office practice and procedure followed in the regular course of business, which shows that the notice has been duly addressed and mailed, is required, even in the absence of a denial of receipt.").

Thus, we cannot conclude that an unreturned letter, without more, constitutes substantial circumstantial evidence that Petitioner received actual notice of his duty to re-register prior to the original February 2007 deadline. Cf. Jones v. Flowers, 547 U.S. 220, 234 (2006) (holding that taxpayer was

not provided sufficient notice of a tax sale involving his property where unclaimed letters "suggest[ed] that [the taxpayer] had not received notice that he was about to lose his property," and concluding that the "State should have taken additional reasonable steps to notify [the taxpayer], if practicable to do so").

In reaching this conclusion, we express our concern regarding the implementation of the biannual re-registration requirement. Because the change in the law imposed an additional registration requirement for sex offender registrants, who were formerly required to register annually, we believe the Sheriff's Office needed to do more than passively rely on an unreturned letter to ensure compliance with the change in the law. In this limited set of circumstances, we find the Sheriff's Office could have made a phone call or sent a deputy to Petitioner's house as his contact information had not changed between August 2006, the new deadline, and February 2007, the original deadline.

Given the significant deprivation of liberty for one who is convicted of failing to re-register due to a change in the law, we hold that substantial circumstantial evidence of actual notice is not satisfied by a negative inference arising from unreturned first class mail. To hold otherwise would effectively minimize a person's significant liberty interest as we have recognized the need for strict compliance to notice requirements even in cases where a property interest was at stake. Cf. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (recognizing that section 12-51-40 of the South Carolina Code, which controls the procedure for notifying delinquent taxpayers that property will be sold to collect delinquent taxes, required that "levy notices on personal property must be sent via certified mail, return receipt requested in order to accomplish 'levy by distress'").

III. Conclusion

In view of our decision in Latimore, we hold the Court of Appeals erred in declining to find that actual notice of the re-registration requirement found in section 23-3-460 was necessary to sustain a conviction under section 23-3-470. Because the State failed to provide any direct or substantial

circumstantial evidence from which a jury could determine that Petitioner had actual notice of the change in the law, we find the trial judge erred in failing to direct a verdict of acquittal. Accordingly, we reverse Petitioner's conviction.

REVERSED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. As I noted in concurrence with this Court's recent decision affirming a conviction under S.C. Code Ann. § 23-3-470, State v. Latimore, 2012 WL 832998 (Mar. 14, 2012), I do not believe this situation is controlled by Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed. 228 (1957), and actual notice is not required for conviction under that section. Indeed, as I noted in Latimore, the Court's decision in that case turned on evidence of the petitioner's constructive notice, not evidence of actual notice.

Constructive, or inquiry, notice is the legal imputation of notice to a person based upon circumstances sufficient to substitute for actual notice. See City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 509, 32 S.E.2d 777, 782 (1945) ("[I]f there are circumstances sufficient to put the party upon inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose." (citations omitted)); Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 64-65, 504 S.E.2d 117, 123 (1998) (explaining that knowledge of facts or circumstances putting a party on notice to inquire constitutes constructive, not implied actual notice).

In Lambert v. People of the State of California, 355 U.S. 225 (1956), the United States Supreme Court applied a similar analysis to notice of criminal prohibitions, though without using the terminology of actual and constructive notice. In effect, the Court found in that case that the registration requirement was not a matter of common knowledge and no circumstances existed that would have given the defendant cause to inquire about the existence of such a requirement. Those circumstances are markedly different from the circumstances of a convicted sex offender who has actual knowledge of registry-related requirements, including those of reregistering at certain intervals and maintaining his current address on file with the sheriff's office. See United States v. Gould, 568 F.3d 459, 468-69 (4th Cir. 2009) (distinguishing Lambert from federal sex-offender registration requirement applying to "a much more narrowly targeted class of persons in a context where sex-offender registration has been the law for years").

In Latimore, this Court found that "[h]ad [the petitioner] attempted to fulfill his annual re-registration requirement in a timely manner, he would

have been informed of the new biannual requirement." 2012 WL 832998 at *3. Thus, the Court based its conclusion that the petitioner had been afforded adequate notice on facts and circumstances within his knowledge that effectively imposed upon him a duty to inquire. In particular, those circumstances were his duty to do an act that would have given him actual notice had he fulfilled that duty. Thus, the Court's analysis was consistent with Lambert and with the definition of constructive notice.

In my view, the facts of this case require the same result. When a convicted sex offender is subject to a duty to maintain a current address with the appropriate authorities, he has constructive notice as to any notification sent to that address. Thus, the evidence that the sheriff's office sent Petitioner a letter by regular mail, return receipt requested, and a certified letter that was returned undeliverable is sufficient evidence to find that he had constructive notice of the reregistration requirement. Indeed, the majority's ruling gives sex offenders who fail to maintain a current address or acknowledge receipt of mail at that address an advantage over those who do not.

The majority reasons that "[w]ithout a copy of the letter [that Detective Catlett testified was sent to Petitioner] there was no evidence that the letter had been properly printed, addressed, and mailed to Petitioner." This finding ignores Detective Catlett's testimony that the sheriff's office had a standard procedure for mailing unregistered letters, return service requested, to sex offenders based upon their month of registration, and that certified letters were sent to registrants who failed to reregister in response to the initial, unregistered letters. The evidence that the registered letter sent to Petitioner was returned unclaimed after three delivery attempts is uncontradicted, and it substantiates Detective Catlett's testimony regarding the procedures used to notify and remind sex offenders of their registration obligations. Thus, the State presented "[p]roof of . . . an office practice and procedure followed in the regular course of business, which show[ed] that the notice ha[d] been duly addressed and mailed[.]" 58 Am. Jur. 2d Notice § 43 (2002). This evidence would have supported a finding that Petitioner had constructive notice of the new, biannual registration requirement.

Moreover, in this case the jury was charged on the theory that Petitioner must have had actual knowledge of the reregistration requirement, whether shown by direct or circumstantial evidence, and it found Petitioner guilty under that standard. Based on the foregoing evidence, the jury could have determined that Detective Catlett sent a notification letter to Petitioner and he received it. Because there is evidence from which the jury could find that Petitioner had actual notice, I would uphold its finding.

Thus, I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Watson William Eldridge IV and Thomas Hadley Eldridge, as Trustees for the Watson William Eldridge, III Revocable Trust, Appellants,

v.

Frances Ulmer Eldridge, Individually and Frances Ulmer Eldridge as Trustee for the Frances Ulmer Revocable Trust, Respondents.

Appeal from Beaufort County
Marvin H. Dukes III, Master-in-Equity

Opinion No. 27123
Heard January 11, 2012 – Filed May 9, 2012

REVERSED AND REMANDED

Kelly McPherson Jolley, of Hilton Head Island, and Robert L. Widener, of McNair Law Firm, of Columbia, for Appellants.

J. Ashley Twombley, of Beaufort, for Respondents.

CHIEF JUSTICE TOAL: This case involves a breach of fiduciary duty by a nonparty trustee and whether title to a home located on Hilton Head Island should be transferred to a revocable trust. The circuit court ultimately found that Appellants failed to timely assert their claim to the home. We disagree.

FACTS/ PROCEDURAL BACKGROUND

William Watson Eldridge III (Father) created two trusts for the ultimate benefit of his sons, William Watson Eldridge IV (Bill) and Thomas Hadley Eldridge (Tom) (collectively, Sons). In 1973, Father formed a revocable trust (R-trust), for which he was the trustee. At the time, the R-trust served primarily for the benefit of Father and his wife (Mother), the principal devolving to Bill and Tom upon their deaths. When Mother died in 1992, Father amended the R-trust to name Bill and Tom as co-successor trustees.

In 1999, Father formed an irrevocable Qualified Personal Residence Trust (QPRT), for which he was trustee, and placed in it a Florida condominium (Florida condo) that he owned. The purpose of creating this trust was to avoid estate taxes upon Father's death since, at the time, his estate was subject to the federal estate tax. Under the terms of the QPRT, Father could sell the Florida condo, but use of the proceeds was limited to the purchase of a replacement home to be placed in the trust, or the purchase of a separate annuity for the benefit of the trust. The trust document named Sons as co-successor trustees of the QPRT. The terms of the QPRT also provided that if Father died within eight years after its formation, the trust assets were to automatically transfer to the R-trust, of which Sons were beneficiaries. If Father was still living eight years after the formation of the QPRT, the trust assets were to be distributed equally among Sons.

Father married Frances Eldridge (Wife) in 2001. Prior to their marriage, Father and Wife entered into a pre-marital agreement to memorialize their intention "to marry for mutual joy," but to keep their estates separate. Wife owned a home in Washington, D.C. and Father

owned the Florida condo. Desiring a "snowbird" home closer to Washington, D.C., they settled on Hilton Head, South Carolina as an ideal middle ground. Acting as trustee of the QPRT trust, Father sold the Florida condo in March 2002 and used the sales proceeds to buy the Hilton Head home. Instead of titling the Hilton Head home in the name of the QPRT trust, as required under the terms of the trust, he titled it in the name of the R-Trust. It is stipulated that this was a breach of Father's fiduciary duty.[1] On April 16, 2003, Father transferred the Hilton Head home from the R-trust to himself and Wife, individually, as joint tenants with the right of survivorship.[2] The parties dispute

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[1] Prior to selling the Florida condo, Father sent a letter to his attorney reminding him that the purpose of setting up the QPRT in 1999 was to minimize estate taxes, and because recent amendments to the federal estate tax law exempted his estate from the tax, he felt the QPRT trust "superfluous." He informed his attorney that he did not want to put the new residence in the QPRT and asked for his advice on ways to "cancel, or nullify the effects of my 'irrevocable QPER Trust,['] or render it inoperable by reason of superseding Federal Tax law." His attorney responded by letter dated December 10, 2001, informing him that his options were to either put the proceeds from the sale of the Florida condo into a qualified annuity, or to "buy out" the QPRT by paying Sons $78,686.00 with his own cash. Nevertheless, after receiving this letter, Father purchased the Hilton Head home with the Florida condo proceeds and titled it in the name of the R-trust. The parties dispute whether the distribution of *inter vivos* gifts to Sons over a period of years was an attempted "buy out" of the QPRT.

[2] A series of letters in the record reflect that a major source of conflict during the early years of Father and Wife's relationship was Wife's insistence that Father title the Hilton Head home in both their names, with right of survivorship. Multiple letters written by Father clearly show his intention that the Hilton Head home ultimately vest with Sons. The couple broke up twice over this issue. The April 16, 2003 transfer was apparently the product of a change of heart by Father. As this case is an adjudication of a breach of trust, the question of Father's intention is not before this Court.

whether Sons knew about this transfer prior to Father's death. Father died on August 6, 2006, and under the right of survivorship, Wife's sole interest in the Hilton Head home became fully vested. Subsequently, she transferred title in the home to herself as trustee of the Frances Ulmer Eldridge Revocable Trust, of which Wife's children are the beneficiaries at her death.

Had Father not breached his fiduciary duty and placed the Hilton Head home in the QPRT trust, this asset would have automatically transferred to the R-Trust upon his August 6, 2006 death. On September 28, 2007, Bill and Tom, as trustees of the R-trust, filed suit against Wife and her trust, claiming that the Hilton Head home was held in either a constructive or a resulting trust for the benefit of the R-trust, and requesting the court to transfer the Hilton Head home to the R-Trust. After a bench trial, the master-in-equity (master) issued judgment in favor of Wife. In doing so, the master made the following findings of fact and conclusions of law:

1. Sons knew of Father's breach of fiduciary duty well before Father died.
2. Before Father's death, Sons had standing to remedy Father's breach of trust under the R-trust and/or the QPRT trust, and they failed to timely assert their right to do so.
3. After death, Father's estate was solvent and Sons could have asserted a claim for money damages against Father's estate, rather than Wife's trust, to remedy the breach of trust.
4. As a matter of law, Sons failed to present evidence necessary to establish a constructive trust.
5. A resulting trust arose in favor of the R-trust, but any relief was barred by the affirmative defense of laches.

Therefore, the master entered judgment in favor of Wife and her trust, and subsequently denied Sons' motion for reconsideration. This case is now before the Court pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether Sons' failure to pursue a legal remedy against Father or Father's estate precludes any action for constructive or resulting trust.

II. Whether laches bars Sons' action for a resulting trust.

STANDARD OF REVIEW

In an action at law tried by a master, an appellate court will affirm the master's factual findings if there is any evidence in the record which reasonably supports them. *Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 105, 712 S.E.2d 395, 397 (2011) (citation omitted). In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Inlet Harbour v. S.C. Dep't of Parks, Rec. & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). However, the appellate court is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings. *Id.* at 387–88, 544 S.E.2d at 623. "Determination of laches rests within the sound discretion of the trial court." *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993).

ANALYSIS

I. Adequate Remedy at Law

Sons request equitable relief in contending that a constructive or resulting trust has arisen over the Hilton Head home. *See Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) ("Equity devised the theory of resulting trust . . . ."); *see also Lollis v.*

Lollis, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) ("An action to declare a constructive trust is in equity . . . ."). Generally, equitable relief is only available where there is no adequate remedy at law. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). The master found that Sons were not entitled to the equitable relief of a resulting or constructive trust because Sons had an adequate remedy at law to cure Father's breach, both before and after Father's death, but failed to timely assert their right to claim damages.[3] We disagree that Sons had an adequate remedy at law.

The master first ruled that Sons, in their status as contingent beneficiaries or co-successor trustees of either the R-Trust or the QPRT, had standing to sue their Father during his lifetime for damages caused by Father's breach of trust but failed to make a timely claim. We note that any claims made against Father during his lifetime must have been brought on behalf of the QPRT, which by its terms was governed by Florida law. The conclusions reached by the master required a number of assumptions about Florida's law of beneficiary and successor standing and Florida's applicable statute of limitations. As a statute of limitations argument is an affirmative defense, it was Wife's burden to argue the applicable Florida law that might have barred Sons' claim. However, Wife's Answer to Sons Complaint generally avers that "[t]he relief sought in Plaintiffs' Complaint is barred by the Statutes of Limitations." In the absence of Wife meeting her burden, the conclusion that Sons failed to make a timely claim during Father's lifetime was error.

Once Father died, and the house vested fully with Wife, Sons' only legal remedy was to bring action on behalf of the R-Trust against Father's estate. Sons contended at trial they did not sue the estate because the estate did not have enough money to cover the damages. The value of Father's probate estate at the time of death was $54,050. The master disagreed with this contention, holding that under section 62-7-505 of the South Carolina Code, "a property of a trust that was

[3] Sons argue generally in their Rule 59(e), SCRCP, Motion for Reconsideration, that this was error.

revocable at the time of the settlor's death is subject to claims of the settlor's creditors . . . to the extent the settlor's probate estate is inadequate to satisfy those claims . . . ." S.C. Code Ann. § 62-7-505 (Supp. 2011). Therefore, for purposes of determining the estate's solvency, the master found that the value of the R-trust could be included, adding $407,897 to the amount of reachable assets. Because Sons brought this action as trustees of the R-trust, the action envisioned by the master—the R-trust suing the estate, but valuing the estate with the assets of the R-trust—would technically result in the R-trust suing itself for damages.

In *Chisolm v. Pryor*, 207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945), this Court elaborated on the adequacy of a legal remedy:

> In order to justify a court of equity in refusing to take jurisdiction, the remedy at law must be adequate, and must attain the full end and justice of the case. It is not enough that there is some remedy at law, but that remedy must be as practical, efficient, and prompt as the remedy in equity.

207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945). Because an action for damages against Father's estate would require funds from the R-trust to supplement damages sought by the R-trust itself, we find that the legal remedy would not have been practical. Therefore, this matter should be decided on equitable principles.

II. Resulting Trust and Laches

The master denied Sons' claim that they were entitled to the Hilton Head home through a constructive trust, but found a resulting trust arose in favor of the R-trust when Father used the proceeds of the QPRT to buy the Hilton Head home.[4] The master denied Sons' prayer

[4] On appeal, Sons dispute the master's finding with regard to the constructive trust, contending that this Court should apply the "trust pursuit rule" to find that the constructive trust that arose when Father took the home out of the QPRT followed the property into the hands of

for title to the Hilton Head home, however, finding their claim barred by the equitable defense of laches. Neither party disputes the master's finding with regard to the resulting trust and, as such, it is the law of the case. *See, e.g., Richland Cnty. v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating an unchallenged ruling, right or wrong, is the law of the case). Therefore, the remaining issue before the Court is whether or not the master erred in finding that Sons' claim to the Hilton Head home is barred by laches.

The equitable defense of laches follows the equitable maxim: "Equity aids the vigilant, not those who slumber on their rights." *Hemingway v. Mention*, 228 S.C. 211, 89 S.E.2d 369 (1955). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Thus, the predicate for laches is an unreasonable and unexplained delay.

There is certainly evidence in the record to support the master's finding that Sons knew of Father's breach of fiduciary duty during his lifetime. In fact, Tom admitted at trial that he received a letter dated August 4, 2005, stating:

Wife. South Carolina courts have not addressed the trust pursuit rule in the context of innocent third parties. In light of the fact that the master found a resulting trust arose, providing Sons the same remedy, we find it unnecessary to venture into the uncharted territory of the trust pursuit rule. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

> My relationship with Frances has been so glorious for my happiness and longevity that I have put the Hilton Head house in our joint names, but still carry it at "cost" on my asset list. Which means that if I die first, she gets the house, but if she dies first, I get it back! Don't make any bets either wway [sic]—we're both 84!

Tom testified that when he confronted Father about the letter, Father got upset with him and stated "he didn't care what anybody said." Seeking to avoid an argument, Tom testified that he "dropped the whole thing and never said anything more about it." Tom further testified that Father told him that he was not going to tell Bill because "Bill would be very upset." This testimony is corroborated by a copy of the August 4, 2005 letter where Tom's name is checked off, but Bill's name is not. Still, the master found that Bill knew Father moved the house out of the QPRT based both on Bill's testimony that he spoke with Father's attorneys about putting the Hilton Head home back in the QPRT and on a billing statement from Father's attorneys showing that a "Bill" called to inquire about adding the Hilton Head home to the QPRT. Bill testified that this line item on the statement referred to Father, who also went by Bill. However, several line items down on this billing statement, there is a description of a call from "Bill, Sr." regarding the estate plan. We uphold the master's finding that Bill knew of Father's breach as early as August 2004, and Tom knew of Father's breach as early as August 2005.

"In general, one with a remainder interest in a trust is not guilty of laches if he sues promptly after his interest vests in possession, even though there was a long delay before his interest became possessory." *Bonney v. Granger*, 292 S.C. 308, 320, 356 S.E.2d 138, 145 (Ct. App. 1987) (citations omitted). Thus, under our jurisprudence Sons were not obligated to sue until after their interest as beneficiaries of the R-trust vested. When Father died in 2006, the QPRT property vested in the R-Trust, and within a year Sons brought action to recover the property. To find this delay was unreasonable would be to stretch the laches doctrine beyond its ordinary bounds. Therefore, the master erred in

holding that laches applied to bar Sons' claim for a resulting trust over the Hilton Head home.

CONCLUSION

We hold that Sons did not have an adequate legal remedy to cure Father's breach of trust, and therefore, disposition of this matter on equitable principles is necessary. It is the law of the case that a resulting trust arose over the Hilton Head home for the benefit of the R-Trust. As Sons filed a claim against Wife and her trust just over a year after Father's death, we hold that laches cannot apply to bar Sons' claim. Accordingly, we reverse and remand with direction that Respondents execute all documents necessary to re-transfer the Hilton Head home to the R-Trust.

REVERSED AND REMANDED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

Appeal from Greenville County
Charles B. Simmons, Jr., Special Circuit Court Judge

Opinion No. 27124
Heard September 22, 2011 – Filed May 9, 2012

REVERSED AND REMANDED

Christopher D. Scalzo, Greenville County Public Defender's Office, of Greenville, and Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Assistant Deputy Director J. Benjamin Aplin, and Legal Counsel Tommy Evans, Jr., of South Carolina Department of Probation, Parole, and Pardon Services, both of Columbia, for Respondent.

JUSTICE HEARN:[1] Jennifer Rayanne Dykes appeals the circuit court's order that she be subject to satellite monitoring for the rest of her natural life pursuant to Section 23-3-540(C) of the South Carolina Code (Supp. 2010). She lodges five constitutional challenges to this statute: it violates her substantive due process rights, her right to procedural due process, the Ex Post Facto clause, the Equal Protection Clause, and her right to be free from unreasonable searches and seizures. We hold the mandatory imposition of lifetime satellite monitoring violates Dykes' substantive due process rights and reverse and remand for further proceedings.

FACTUAL/PROCEDURAL BACKGROUND

Dykes was indicted for lewd act on a child under the age of sixteen in violation of Section 16-15-140 of the South Carolina Code (2003) as a result of her relationship with a fourteen-year-old girl while Dykes was twenty-six years old. The two met when Dykes was working at a local discount store and developed an eight month relationship. Dykes ultimately pled guilty to lewd act and was sentenced to fifteen years' imprisonment, suspended upon the service of three years and five years' probation. Because her offense predated the satellite monitoring statute, she was not subject to monitoring at the time of her plea.

Prior to her release from prison, Dykes was evaluated pursuant to the Sexually Violent Predator Act and found not to meet the definition of a sexually violent predator. Accordingly, no civil commitment proceedings were initiated, and she was released on probation. At the time of her release, she was notified verbally and in writing that pursuant to section 23-3-540(C) she would be placed on satellite monitoring if she were to violate the terms of her probation.

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[1] Because a majority of the Court has joined the separate concurring opinion of Justice Kittredge, his concurrence is now the controlling opinion in this case.

Soon after Dykes' release, five citations and arrest warrants were issued to her for various probation violations: a citation pertaining to her relationship with a convicted felon whom Dykes met while incarcerated and with whom she was then residing; an arrest warrant for Dykes' continued relationship with that individual; a citation for drinking an alcoholic beverage; a citation for being terminated from sex offender counseling after she cancelled or rescheduled too many appointments; and an arrest warrant for failing to maintain an approved residence and changing her address without the knowledge or consent of her probation agent. Dykes did not contest any of these violations, but she did offer a context to each one in mitigation.

The State recommended a two-year partial revocation of Dykes' probation and mandatory life-time satellite monitoring. When an individual has been convicted of engaging in or attempting criminal sexual conduct with a minor in the first degree (CSC-First)[2] or lewd act, the court must order that person placed on satellite monitoring. S.C. Code Ann. § 23-3-540(A). Likewise, if a person has been convicted of those offenses before the effective date of the statute and violates a term of his probation, parole, or supervision program, he too must be placed on satellite monitoring. *See id.* § 23-3-540(C). Once activated, the monitor can pinpoint the individual's location to within fifteen meters. The individual must remain on monitoring for as long as he is to remain on the sex offender registry, *id.* § 23-3-540(H), which is for life, *id.* § 23-3-460. There is no statutory mechanism to petition the court for relief from this lifetime monitoring.

In contrast, if a person is convicted of committing or attempting any of the following offenses, or was previously convicted of one and violates a term of his probation, parole, or supervision, the court has discretion[3] with respect to whether the individual should be placed on satellite monitoring:

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[2] Specifically, the individual must have engaged in a sexual battery with a victim who is less than eleven years old. S.C. Code Ann. § 23-3-540(A) (Supp. 2010) (cross-referencing *id.* § 16-3-655(A)(1) (Supp. 2010)).

[3] The statute does not provide any criteria to aid the court in determining whether to order monitoring for these individuals.

criminal sexual conduct with a minor in the second degree; engaging a child for sexual performance; producing, directing, or promoting sexual performance by a child; assaults with intent to commit criminal sexual conduct involving a minor; violation of the laws concerning obscenity, material harmful to minors, child exploitation, and child prostitution; kidnapping of a person under the age of eighteen unless the defendant is a parent; and trafficking in persons under the age of eighteen if the offense includes a completed or attempted criminal sexual offense. *Id.* § 23-3-540(B), (D), (G)(1).

After ten years, an individual who has committed the above-stated crimes may petition the court to have the monitoring removed upon a showing by clear and convincing evidence that he has complied with the monitoring requirements and there is no longer a need to continue monitoring him. *Id.* § 23-3-540(H). If the court denies his petition, he may petition again every five years. *Id.* As long as the individual is being monitored, he must comply with all the terms set by the State, report damage to the device, pay for the costs of the monitoring (unless he can show severe hardship), and not remove or tamper with the device; failure to follow these rules may result in criminal penalties. *Id.* §§ 23-3-540(I) to (L).

Furthermore, the satellite monitoring program places restrictions on the subject's movements as well. In response to a question from the bench during oral argument concerning Dykes' ability to travel outside the State of South Carolina while wearing the device, counsel for the Department of Probation, Parole, and Pardon Services—who appeared on behalf of the State—represented that out-of-state travel was not restricted. However, following oral argument, counsel corrected this error in a letter to this Court stating that the department's policy for monitoring "restricts travel outside the State of South Carolina unless there is approval by the supervising agent. This plan will not allow for overnight travel except in the case of an emergency, and must be approved by the Regional Director." Thus, a person subject to satellite monitoring may not leave the State without prior approval and may only be gone overnight in the case of an emergency. For Dykes, this restriction on her right to travel freely in this country would, pursuant to the

policy, extend throughout her life, without any possibility of petitioning the court for relief.

At her probation revocation hearing, Dykes objected to the constitutionality of mandatory lifetime monitoring. In support of her arguments, Dykes presented expert testimony that she personally poses a low risk of reoffending and that one's risk of reoffending cannot be determined solely by the offense committed. Thus, the core of Dykes' constitutional challenge is that the State cannot monitor someone who poses a low risk of reoffending. Dykes' expert, however, did acknowledge that there is at least some risk that everyone will reoffend.

The circuit court found Dykes to be in willful violation of her probation and that she had notice of the potential for satellite monitoring. While the court clearly was troubled by the scope and breadth of section 23-3-540(C), it denied Dykes' constitutional challenges and found it was statutorily mandated to impose satellite monitoring without making any findings as to Dykes' likelihood of reoffending. The court also revoked Dykes' probation for two years, but it ordered that her probation be terminated upon release. This appeal followed.

LAW/ANALYSIS

Dykes argues that requiring she submit herself to lifetime satellite monitoring when she poses a low risk of reoffending violates her substantive due process rights under the Fourteenth Amendment to the United States Constitution. We agree.

"[A]ll statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). Accordingly, we will not find a statute unconstitutional unless "its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id.* at 570, 549 S.E.2d at 597. The party challenging the validity of a statute bears the burden of proving it is

unconstitutional. *See Knotts v. S.C. Dep't of Natural Res.*, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002).

The Constitution's provision that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law," U.S. Const. amend. XIV, § 1, guarantees more than just fair process; it "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them,'" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The core of the Due Process Clause, therefore, is the protection against arbitrary governmental action. *Id.* at 845. Substantive due process in particular protects against the arbitrary infringement of "fundamental rights that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969)).

However, one does not have a general liberty interest simply in being free from arbitrary and capricious government action. *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (en banc). Rather, "the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest." *Id.* If the interest infringed upon is a fundamental right, the statute must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *see also In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). If the right is not a fundamental one, the statute is only subject to rational basis review. *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347. Dykes does not argue South Carolina's satellite monitoring scheme fails the lesser rational basis review, choosing instead to rely exclusively on strict scrutiny. Accordingly, we proceed only under this heightened review and must first determine whether the alleged right the statute infringes upon is fundamental.

Before analyzing the right argued by Dykes, we note that we must tread carefully in this arena. Over the years, the Supreme Court of the United States has expanded the liberty interest protected by the Due Process Clause beyond the specific freedoms contained in the Bill of Rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the Supreme Court has found the right to marry, have children, direct the education of one's children, marital privacy, use contraception, retain bodily integrity, and receive an abortion are all protected). The Supreme Court, however, "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Furthermore, when a court deems a right fundamental under the umbrella of substantive due process, it effectively removes the matter from discussion and legislative debate. *Glucksberg*, 521 U.S. at 720. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (internal citations and quotations omitted).

Hence, the Due Process Clause only "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *See id.* at 720-21 (internal citations and quotations omitted). To guard against unwarranted expansions of protected liberty interests, we must give a "careful description" of the asserted right, using this country's history and traditions as "the crucial guideposts for responsible decisionmaking." *Id.* at 721 (internal citations and quotations omitted). The Supreme Court's

> substantive-due-process jurisprudence . . . has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This

> approach tends to rein in the subjective elements that are necessarily present in due-process judicial review.

Id. at 722. With that in mind, we turn to the right Dykes alleges has been infringed upon.

Dykes asserts that the State's continuous monitoring of her location violates her fundamental right "to be let alone." However, this broad statement is an "issue-begging generalization[] that cannot serve the inquiry" of delineating the precise contours of the asserted right. *See Hawkins*, 195 F.3d at 747. When viewed in light of the facts of this case and the authorities relied upon by Dykes, the narrow right on which she relies is the right of a convicted sex offender who has been released from prison and not serving a probationary term to be free from satellite monitoring for the rest of her life absent a demonstration that she is likely to reoffend.

Although Dykes has overstated the exact right on which she relies, traditional notions of liberty and the right to be let alone are instructive for they provide the context within which we must analyze Dykes' specific right. William Blackstone, in his landmark Commentaries on the Laws of England, noted that man is generally endowed with free will, but that freedom is not absolute and each of us relinquishes some of it to be part of an organized society:

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when He endued him with the faculty of freewill. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a

> purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it.

1 William Blackstone, Commentaries *121. Blackstone also found, however, that the government's right to restrict an individual's free will is not immutable:

> Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint on the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty[.] . . . So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed) where there is no law, there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

Id. at *121-22.

Thus, the concept of liberty as being unrestrained except as necessary to provide order in society is deeply rooted in the foundations of our common law system, and any further restriction would be tyranny. Indeed, Blackstone's commentary reflects our substantive due process milieu, where the core rights of freedom and liberty can only be limited when sufficiently necessary to advance the public good. Furthermore, various members of the Supreme Court have voiced their views that the government has a very limited ability to infringe on one's liberty. Louis Brandeis, before he became a Justice, wrote in a law review article,

> [T]here came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges . . . .

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890). After he joined the Supreme Court, Justice Brandeis noted that the Founding Fathers

> recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by Berger v. New York*, 388 U.S. 41 (1967) *and Katz v. United States*, 389 U.S. 347 (1967).

Not long thereafter, a majority of the Supreme Court stated,

> [T]he domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when it was recognized, as long ago as it was, that liberty is something more than exemption from physical restraint . . . .

Palko, 302 U.S. at 327.

Additionally, in an oft-quoted dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan wrote,

> [T]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

Id. at 543 (Harlan, J., dissenting).[4] These words "eloquently" describe the Court's role in the substantive due process inquiry. *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977).

In *Glucksberg*, however, the Supreme Court admonished overreliance on these vague and free-flowing concepts of liberty in the due process analysis. Although the Supreme Court has, in the past, relied in particular on

[4] The majority in *Poe* did not reach the substantive issue involved because it found the case to be nonjusticiable. *Poe*, 367 U.S. at 507-09.

Justice Harlan's dissent in *Poe* in its fundamental rights analysis, at no point has the Court jettisoned its "established approach" of searching for concrete examples of the claimed right in the Court's jurisprudence. *Glucksberg*, 521 U.S. at 721-22 & n.17. In the context of this case, the Court's reaffirmance of the historical approach to fundamental rights presents us with an interesting quandary. While we must search for historical examples of the claimed right in order to find it one deeply rooted in our legal tradition and therefore fundamental, the ability to track an individual's precise location is a relatively recent technological innovation without a historical antecedent.

Nevertheless, we believe the mere fact that something is a new invention does not preclude the finding that it implicates a fundamental right. Constitutional principles cannot be "entirely unaffected by the advance of technology," *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001), and courts must be able to incorporate new innovations into our existing constitutional framework.[5] *Glucksberg* strongly reminded courts to avoid a generous application of the Due Process Clause to state actions and insisted on a historical focus as a check. Here, however, there is no history for us to examine, not because the claimed right is not deeply rooted in our traditions, but instead because satellite monitoring is a new invention the Founding Fathers could not have envisioned. In the absence of a history to rely on in similar circumstances, the Court has resorted to examining more traditional notions of liberty. *Cf. Griswold*, 381 U.S. at 482-86 (detailing general concepts of privacy under the Constitution and concluding that proscribing the use of contraception "is repulsive to the notions of privacy surrounding the marriage relationship"). At this point, a careful delineation of the exact

[5] As Chief Justice Roberts stated in 2006, "the impact of technology across the law" is going to be the biggest challenge for the Court in the coming years. Chief Justice John G. Roberts, Jr., Address at the Charleston School of Law (Oct. 20, 2006) (video recording on file in the Charleston School of Law Sol Blatt, Jr., Law Library). Especially with respect to constitutional rights, the Court is going to be confronted with "the impact of technology on areas of the law that we thought had been pretty well settled and established and are going to have to be revisited and rethought in the light of the new science." *Id.*

nature of the claimed right serves to prevent the gratuitous expansion of fundamental rights. Thus, while we proceed without much history on which we can rest our analysis, narrowly defining the right Dykes argues has been infringed upon acts as the sort of check and guidepost the Court emphasized in *Glucksberg*.

As we previously stated, the right at issue in this case is the right of a convicted sex offender who is not under any probationary or similar restrictions to be free from continuous satellite monitoring for life when she poses a low risk of reoffending. We begin first by examining the general impact of the satellite monitoring scheme. Recently, the Supreme Court had the opportunity to address a similar issue in *United States v. Jones*, No. 10-1259, 2012 WL 171117 (Jan. 23, 2012), albeit in a different context. At issue in *Jones* was whether the government's surreptitious placement of a GPS tracking device on Jones's car without a warrant was an unconstitutional search. 2012 WL 171117, at *2. The majority held that it was because the attachment of the monitor to the car was a physical trespass on personal property for the purpose of obtaining information. *Id.* at *3.

In his concurring opinion, Justice Alito tackled the thornier question of whether this satellite monitoring violated an individual's reasonable expectation of privacy. Justice Alito aptly observed that recent technological advancements have placed vast swaths of information into the public realm, a development which "will continue to shape the average person's expectations about the privacy of his or her daily movements."[6] *Id.* at *17 (Alito, J., concurring). With that in mind, he concluded monitoring one's movements on a public street for a relatively short period of time would not violate an individual's reasonable expectations of privacy. *Id.* (citing *United States v.*

[6] In *Jones*, the monitor placed on underside of Jones's car constantly tracked the car's movements over a four-week period without his knowledge. 2012 WL 171117, at *2. The majority's contention to the contrary, Justice Alito noted there is no eighteenth century analogue to this type of investigation, because that "would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience." *Id.* at *11 n.3 (Alito, J., concurring).

Knotts, 460 U.S. 276, 281-82 (1983)). When that monitoring becomes long-term, however, the nature of the invasion changes:

> But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.

Id. Applying this principle to the four-week monitoring at issue in *Jones*, Justice Alito concluded, "We need not identify with precision the point at which the tracking of th[e] vehicle became a search, for the line was surely crossed before the 4-week mark." *Id.*

Justice Sotomayor similarly noted we live in an age so inundated with technology that we may unwittingly "reveal a great deal of information about [our]selves to third parties in the course of carrying out mundane tasks." *Id.* at *10 (Sotomayor, J., concurring). In that vein, she agreed with Justice Alito's concerns about the intrusiveness of satellite monitoring: "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[7] *Id.* at *9. Thus, satellite monitoring invites the State into the subject's world twenty-four hours per day, seven days per week, and it provides the State with a precise view of her intimate habits, whether she is in public or not. If we are not careful about and cognizant of this fact, "the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse" and "may 'alter the relationship between citizen and government in a way that is

[7] Justice Alito's concurrence was joined by three other members of the Court, Justice Ginsburg, Justice Breyer, and Justice Kagan. After noting she shared the same concerns as Justice Alito, Justice Sotomayor wrote that "[r]esolution of these difficult questions . . . is unnecessary" at this time because the majority's trespass theory was dispositive of the case. *Jones*, 2012 WL 171117, at *10 (Sotomayor, J., concurring).

inimical to democratic society.'" *Id*. (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

Although these cases were decided under the rubric of the Fourth Amendment, we nevertheless find them instructive here. As Justice Alito and Justice Sotomayor incisively observed, the very concept of what we as citizens view as private is called into question by technology which facilities unprecedented oversight of our lives. More importantly, at issue in this case is not just the tracking of individuals for a period of time while they are being investigated for a specific crime—as with a Fourth Amendment search—but the statutorily mandated monitoring of certain individuals for as long as they live with no ability to have it removed. *See United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc) ("By holding that this kind of surveillance doesn't impair an individual's reasonable expectation of privacy, the panel hands the government the power to track the movements of every one of us, every day of our lives."). We must not forget that "liberty is something more than exemption from physical restraint" and includes a "liberty of the mind." *Palko*, 302 U.S. at 327. As our history from Blackstone to *Jones* accordingly makes clear, the Constitution guarantees a certain freedom from government intrusion into the day-to-day order of our lives which lies at the heart of a free society. In our opinion, "neither liberty nor justice would exist" if the government could, without sufficient justification, monitor the precise location of an individual twenty-four hours a day until he dies.

We turn next, as we must, to whether Dykes' status as a convicted sex offender alters this result. Although the concurrence believes it does, we disagree for the reasons below. The State first argues that satellite monitoring is akin to sex offender registration and is, indeed, less intrusive than registration. Numerous courts, including this Court, have routinely held that convicted sex offenders do not have a fundamental liberty interest to be free from registration requirements. *E.g., Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 500 (6th Cir. 2007); *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004); *Ark. Dep't of Corr. v. Bailey*, 247 S.W.3d 851, 861 (Ark. 2007); *State v. Germane*, 971 A.2d 555, 584 (R.I. 2009); *Hendrix v. Taylor*, 353 S.C.

542, 552, 579 S.E.2d 320, 325 (2003); *McCabe v. Commonwealth*, 650 S.E.2d 508, 512 (Va. 2007). However, a requirement that a person register is qualitatively different than a requirement that a person submit to mandatory satellite monitoring of his location for the rest of his life. The State argues that the inverse is true and that it is the sex offender registry which is more invasive. In particular, the State points out that the registry provides the public with the offender's full name, address, and offense history. Furthermore, the registry contains a photograph of the individual in addition to a physical description, complete with a list of tattoos and scars. In contrast, information obtained through satellite monitoring of that individual is limited to only the person's location and is not available to the public.

While all of this may be true, the State misapprehends the thrust of Dykes' argument. She does not contend public availability of the information implicates a fundamental right, but rather that citizens have a right to be free from state monitoring of their every movement. This sort of constant surveillance reveals the intimate details of her private life by compiling a complete picture of her movements in public and in private that tells the story of how she lives her life, information not available through the registry. It is this invasion of privacy and infringement of an individual's freedom from government interference with the liberty of the mind that implicates substantive due process. Additionally, Dykes is no longer on probation and therefore is not subject to the limited liberty interest courts recognize for those serving probationary terms. *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (noting that offenders on probation "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

It is true that convicted felons do not have the same constitutional liberties as those who have not been convicted of a felony. *See State v. Bowditch*, 700 S.E.2d 1, 12 (N.C. 2010); *cf. Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) ("It is undisputed that a state may constitutionally disenfranchise convicted felons, and that the right of felons to vote is not fundamental."). The State accordingly argues, and the concurrence agrees,

that Dykes does not enjoy the full liberty interest described above because she is a convicted sex offender.

However, this misses the nature of the right in question. The precise right Dykes claims is fundamental is the right of a convicted sex offender who is not under any probationary or similar restrictions and *who poses a low risk of reoffending* to be free from continuous satellite monitoring. In our opinion, if Dykes poses a low risk of reoffending, then her status as a convicted sex offender is no longer a compelling reason to impair her constitutional rights in this regard. As we discuss below, a sex offender's likelihood of reoffending is the impetus for imposing satellite monitoring; as the risk of reoffending diminishes, so too does the rationale for monitoring her. Therefore, while Dykes' status as a convicted felon may impair her rights to some degree, we do not believe the fact that she stands convicted of a sex crime, by itself, is sufficient to warrant lifetime continuous government tracking of her location. If Dykes does pose a low risk of reoffending, it accordingly is clear to us beyond a reasonable doubt that section 23-3-540(C) would infringe on her fundamental rights. *See State v. Stines*, 683 S.E.2d 411, 413 (N.C. Ct. App. 2009) (finding satellite monitoring implicates a liberty interest).

We are also deeply troubled by the policy restricting the interstate travel of the subject being monitored. "The right to travel is inherent in the concept of our country as a federal union; hence the right to travel is a fundamental constitutional right under the federal constitution." *Mitchell v. Steffen*, 504 N.W.2d 198, 200 (Minn. 1993); *see also Pelland v. Rhode Island*, 317 F. Supp. 2d 86, 90 (D.R.I. 2004) ("American citizens enjoy the constitutionally protected liberty to travel across state borders."). Where an individual is still under a probationary or similar term, a state may constitutionally restrict his right to travel. *See Pelland*, 317 F. Supp. 2d at 91; *see also United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999) (recognizing conditions of release may curtail certain fundamental rights). However, it is a different situation when a person is not on probation. Requirements that a sex offender notify officials when he leaves the state have been upheld as not sufficiently burdening interstate travel. *See, e.g.*,

United States v. Shenandoah, 595 F.3d 151, 162-63 (3d Cir. 2010); *State v. Wigglesworth*, 63 P.3d 1185, 1190 (Or. Ct. App. 2003). Far from being a mere notification requirement, the policy here is a flat prohibition against crossing state lines absent government approval. We can see few clearer burdens on interstate travel than having to seek prior permission from the State to leave South Carolina and permitting overnight stays only in emergency situations and with approval solely by the regional director.

Next, we must determine whether section 23-3-540(C) is narrowly tailored to serve a compelling state interest, thus surviving strict scrutiny.[8] One cannot "minimize the importance and fundamental nature of [an individual's liberty interest]. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be

[8] We note Dykes posits her argument of unconstitutionality solely in terms of strict scrutiny. With great respect for the concurrence, we do not believe Dykes' repeated statements that the statute is arbitrary and capricious are sufficient to invoke the rational basis test. Rational basis review and strict scrutiny are merely the vehicles through which we determine whether a statute is arbitrary for due process purposes, and using the term "arbitrary" or "capricious" is not determinative of the level of review we apply. However, if we were to apply rational basis review, we would be inclined to find the statute constitutional. Absent the implication of a fundamental right, "[t]he impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose." *See Reno*, 507 U.S. at 305. A law also "need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88 (1955). The State undoubtedly has an important interest in investigating sexual assaults against children, and Dykes has not challenge this interest. Furthermore, we believe requiring those who have committed similar crimes in the past to be monitored is at least rationally related to that interest and not wholly arbitrary, especially if their right to be free from monitoring is not fundamental.

subordinated to the greater needs of society." *United States v. Salerno*, 481 U.S. 739, 750-51 (1987). For as Blackstone so eloquently wrote, "[T]his species of legal obedience and conformity is infinitely more desirable[] than that wild and savage liberty which is sacrificed to obtain it." 1 William Blackstone, Commentaries *121. Dykes concedes that protecting the public from sex offenders who pose a high risk of reoffending is a compelling state interest; she steadfastly maintains, however, that protecting the public from those who have a low risk of reoffending is not a compelling state interest. We agree.

It is beyond question that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002). In fact, "the victims of sexual assault are often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 33. Thus, the General Assembly noted "[s]tatistics show that sex offenders often pose a high risk of re-offending," S.C. Code Ann. § 23-3-400 (2007), prompting it to enact provisions "to protect the public from those sex offenders who may re-offend," *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). However, imposing measures which are justified, at least substantially in part, by the possibility that an individual may reoffend without any actual consideration of his likelihood to reoffend is incongruous and arbitrary. Monitoring sex offenders who pose a low risk of reoffending for the rest of their lives is not "sufficiently weighty" such that the subject's liberty interest in being free from government monitoring must be "subordinated to the greater needs of society." *See Salerno*, 481 U.S. at 750-51. The same is true with respect to the State's travel policy for it unquestionably infringes on Dykes' fundamental right to travel without any consideration of whether such a restriction is warranted.

We therefore hold that requiring Dykes, a convicted sex offender who is under no probationary or similar restrictions, to submit to satellite monitoring for the rest of her life *if she poses a low risk of reoffending* violates her substantive due process rights. To paraphrase Blackstone, section 23-3-540(C)'s application to Dykes has the potential to decrease her

natural liberty without any attendant increase in overall civil liberty. However, because the circuit court made no findings as to Dykes' chance of reoffending, a remand is in order for that determination.

We emphasize that our holding today is a narrow one and the satellite monitoring provisions remain largely intact.[9] First, we do not suggest that satellite monitoring as a whole is unconstitutional. Rather, it is only the mandatory monitoring of those who pose a low risk of reoffending that violates due process. Furthermore, our holding only extends to those who are not under any term of probation, parole, or similar restrictions; we express no opinion as to whether mandatory monitoring those who are on probation, parole, or community supervision implicates substantive due process. Our holding also only applies to those who have no mechanism to have the monitoring removed because they have a conviction of CSC-First or lewd act. Given the manner in which Dykes framed this issue to us and the strictures of *Glucksberg*, we also do not reach today the issue of whether those individuals who are found to pose a high risk of reoffending have a due process right to discretionary imposition or periodic review of their lifetime monitoring.

Accordingly, the circuit court on remand will exercise discretion to determine Dykes' risk of reoffending. If it finds she has a low risk of re-

[9] Consistent with the severability clause found in 2006 Act No. 346—the act passing section 23-3-540—the only portions of the statute affected by our decision are that the court "must" order satellite monitoring for those convicted of CSC-First and lewd act and that these persons have no means of petitioning for relief from the monitoring. *See* 2006 Act No. 346 § 8 (stating that if a court were to find any portion of the statute unconstitutional, that holding does not affect the rest of the statute and the General Assembly would have passed it without that ineffective part); *see also Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959) ("When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision.").

offending but nevertheless imposes monitoring, Dykes will be able to petition for release from the monitoring after ten years, consistent with section 23-3-540(H).

CONCLUSION

For the foregoing reasons, we reverse the order of the circuit court and remand for proceedings consistent with this opinion.[10]

BEATTY, J., concurs. KITTREDGE, J., concurring in a separate opinion in which TOAL, C.J. and PLEICONES, J., concur.

[10] Because our conclusion here is dispositive of Dykes' appeal, we do not reach her remaining challenges to section 23-3-540(C). *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that a court need not reach remaining issues if one issue is dispositive of the appeal).

JUSTICE KITTREDGE: I concur in result. I commend my learned colleague for her scholarly research, and I agree with the majority's general proposition that persons have a fundamental right "to be let alone." But I respectfully disagree that Appellant, as a convicted child sex offender, possesses a right that is fundamental in the constitutional sense. I do not view Appellant's purported right as fundamental. I would find Appellant possesses a liberty interest entitled to constitutional protection, for all persons most assuredly have a liberty interest to be free from *unreasonable* governmental interference. I would find that the challenged mandatory lifetime, non-reviewable satellite monitoring provision in section 23-3-540(C) is arbitrary and fails the minimal rational relationship test.[11]

I.

I begin with the premise that satellite monitoring is predominantly civil. See Smith v. Doe, 538 U.S. 84 (2003) (noting that whether a statute is

[11] Following the rape and murder of a nine year-old-girl by a convicted sex offender who lived across the street, Florida passed the Jessica Langford Act in 2005. This Act, referred to as "Jessica's Law," heightened criminal sentences and post-release monitoring of child sex offenders. Many states, including South Carolina, followed suit in adopting some version of Jessica's Law. However, South Carolina's requirement of mandatory lifetime monitoring without review is more severe than the statutory scheme of other jurisdictions. A common approach among other states that have adopted some form of "Jessica's Law" is to require either a predicate finding of probability to re-offend or provide a judicial review process, which allows for, upon a proper showing, a court order releasing the offender from the satellite monitoring requirements. See generally, N.C. Gen. Stat. Ann. § 14-208.43 (West 2010) (providing a termination procedure one year after the imposition of the satellite based monitoring or a risk assessment for certain offenders). In accordance with the severability clause in South Carolina's statutory scheme, I concur with the finding of the majority expressed in footnote 7 that the offenses of criminal sexual conduct in the first degree and committing or attempting a lewd act upon a child under sixteen must follow the process as outlined for the balance of child sex related offenses.

criminal or civil primarily is a question of statutory construction). Where, as here, the legislature deems a statutory scheme civil, "only the clearest proof" will transform a civil regulatory scheme into that which imposes a criminal penalty. Id. at 92 (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)) (internal quotations omitted).

The General Assembly expressly stated its intent:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens [by] . . . provid[ing] law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of reoffending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (2007). This Court has examined this language and held "it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Thus, a likelihood of re-offending lies at the core of South Carolina's statutory scheme.

II.

The United States Supreme Court has cautioned restraint in the recognition of rights deemed to be fundamental in a constitutional sense. Washington v. Glucksberg, 521 U.S. 702 (1997). Courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [members of the judiciary]." Id. at 720. The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" Id. at

720-21 (internal citations omitted). I would not hold that a convicted child sex offender has a fundamental right to be "let alone" that is "deeply rooted in this Nation's history and tradition." Given the civil nature of satellite monitoring and the clear authority of the legislature to impose such a regulatory scheme, I respectfully reject the suggestion that a convicted child sex offender's limited liberty interest morphs into a fundamental right when the active sentence comes to an end.

Notwithstanding the absence of a fundamental right, I do believe lifetime imposition of satellite monitoring, with no consideration of likelihood of re-offending, implicates a liberty interest and invokes minimum due process protection.[12] See Commonwealth v. Cory, 911 N.E.2d 187 (Mass. 2009) (finding satellite monitoring burdens an offender's liberty

[12] In my opinion, although Appellant posited her main argument in terms of strict scrutiny, Appellant's presentation of a due process challenge sufficiently permits the Court to consider such claim under the lesser levels of scrutiny. Indeed, Appellant's final brief contains many assertions that fit the rational relationship test, for example:

> Substantive due process protects citizens against arbitrary or capricious action by the government regardless of the procedures used to carry out that action. . . . In this case, appellant's substantive due process rights were violated because §23-3-540(C) mandated [the trial judge] arbitrarily and capriciously imposed lifetime GPS monitoring on her. The imposition was arbitrary and capricious . . . . The substantive component of this right prohibits the state from arbitrarily or capriciously depriving a person of life, liberty, or property regardless of whether or not the way in which the government carries out this deprivation is, itself, ostensibly fair.

The concept of "arbitrary and capricious" lies at the heart of the rational relationship test. Therefore, I would find that the Court may properly consider Appellant's due process challenge under the rational relationship test.

interest in two ways, by "its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities"). Thus, courts must "ensure[] that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary . . . ." In re Treatment and Care of Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002); see also Nebbia v. N.Y., 291 U.S. 502, 525 (1934) ("[T]he guarant[ee] of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious . . . ."); Hamilton v. Bd. of Trs. of Oconee County Sch. Dist., 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984) (holding that, to comport with due process, the legislation must have a rational basis for the deprivation and may not be "so inadequate that the judiciary will characterize it as arbitrary").

Having served her sentence, I believe Appellant possesses a liberty interest that is violated by the mandatory, non-reviewable provisions of section 23-3-540(C). Applying the rational basis test to Appellant's due process challenge, I would find the mandated lifetime satellite monitoring and absence of any judicial review related to an assessment of an individual's likelihood of re-offending renders the challenged provision arbitrary. Further, in light of the legislature's predication of the statutory scheme on the substantial purpose of protecting the public from sex offenders who may re-offend, I would find the lack of risk assessment within section 23-3-540(C) not rationally related to such purpose, and thus unconstitutional. See Addington v. Texas, 441 U.S. 418 (1979) (finding an individual's liberty interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by clear and convincing proof); Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding sexually violent predator commitment statute and emphasizing the role of the review to ensure commitment lasts only so long as it is necessary to protect the public); see also Lyng v. Int'l Union, 485 U.S. 360 (1988) (noting that although allegedly arbitrary legislation invokes the least intrusive rational basis test, that standard of review is "not a toothless one"); Luckabaugh, 351 S.C. at 139-40, 568 S.E.2d at 346 (finding due process ensures that a statute which deprives a person of a liberty interest has "at a minimum, a rational basis, and may not be arbitrary").

I believe the finding of arbitrariness is additionally supported by the South Carolina Constitution, which, unlike the United States Constitution, has an express privacy provision. See S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ."). While our constitution's privacy provision does not transform a purported privacy interest into a fundamental right for purposes of applying the strict scrutiny test, I believe it does inform the analysis of whether a state law is arbitrary and lends additional support to the conclusion that section 23-3-540(C) is unconstitutional. Cf. State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) (holding that by articulating a specific prohibition against unreasonable invasions of privacy, the people of South Carolina have indicated a higher level of privacy protection than the federal Constitution).

Therefore, I concur in result to reverse and remand.

TOAL, C.J., and PLEICONES, J., concur.

The Supreme Court of South Carolina

RE: Rule Amendments

O R D E R

On January 31, 2012, the following orders were submitted to the General Assembly pursuant to Article V, §4A, of the South Carolina Constitution:

(1) An order amending the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

(2) An order amending the South Carolina Rules of Family Court.

(3) An order amending the South Carolina Rules of Probate Court.

A copy of these orders is attached. Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 30, 2012

The Supreme Court of South Carolina

RE: Amendments to South Carolina Court-Annexed Alternative Dispute Resolution Rules

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O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Court-Annexed Alternative Dispute Resolution Rules are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2012

Rule 2
Definitions

(a) Mediation. An informal process in which a third-party mediator facilitates settlement discussions between parties. Any settlement is voluntary. In the absence of settlement, the parties lose none of their rights to trial.

(b) Mediator. A neutral person who acts to encourage and facilitate the resolution of a dispute. The mediator does not decide the issues in controversy or impose settlement.

(c) Arbitration. An informal process in which a third-party arbitrator issues an award deciding the issues in controversy. The award may be binding or non-binding as specified in these rules.

(d) Arbitrator. A neutral person who acts to decide the issues in controversy of a dispute.

(e) Early Neutral Evaluation. An informal process in which a third-party evaluator provides a non-binding evaluation of the matters in controversy, assists the parties in identifying areas of agreement, offers case planning suggestions, and assists in settlement discussions.

(f) Evaluator. A neutral person who provides an evaluation of the issues in controversy in a dispute as described in these rules.

(g) Neutral. A mediator, arbitrator or evaluator.

(h) Certified. A mediator or arbitrator who is approved by the Board of Arbitrator and Mediator Certification to be eligible for court appointment pursuant to these rules.

(i) Alternative Dispute Resolution (ADR) Conference. A mediation or arbitration. Arbitration conferences may also be referred to as hearings.

(j) Roster. The official list of certified neutrals maintained and published by the South Carolina Supreme Court Board of Arbitrator and Mediator Certification.

(k) Board. The South Carolina Supreme Court Board of Arbitrator and Mediator Certification.

Rule 3
Actions Subject to ADR

(a) Mediation. All civil actions filed in the circuit court, all cases in which a Notice of Intent to File Suit is filed pursuant to the provisions of S.C. Code §15-79-125(A), and all contested issues in domestic relations actions filed in family court, except for cases set forth in Rule 3(b) or (c), are subject to court-ordered mediation under these rules unless the parties agree to conduct an arbitration. The parties may select their own neutral and may mediate, arbitrate or submit to early neutral evaluation at any time.

(b) Exceptions. ADR is not required for:

(1) special proceedings, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

(2) requests for temporary relief;

(3) appeals;

(4) post-conviction relief (PCR) matters;

(5) contempt of court proceedings;

(6) forfeiture proceedings brought by governmental entities;

(7) mortgage foreclosures;

(8) family court cases initiated by the South Carolina Department of Social Services; and

(9) cases that have been previously subjected to an ADR conference, unless otherwise required by this rule or by statute.

(c) Motion to Refer Case to Mediation. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

Rule 4
Selection or Appointment of Neutral

(a) Eligibility. A neutral may be a person who:

(1) is a certified neutral under Rule 15; or

(2) is not a certified neutral but, in the opinion of all the parties is otherwise qualified by training or experience to mediate, arbitrate or evaluate all or some of the issues in the action. If the person is not a certified neutral, he or she must disclose the lack of certification and obtain written consent from all parties to the ADR Conference on a form approved by the Supreme Court or its designee.

(b) Roster of Certified Neutrals. The Board shall maintain a current roster ("Roster") of neutrals certified under Rule 15 who are willing to serve in each county. The Board shall make the Roster available to the clerks of court for each county. A certified neutral shall notify the Supreme Court's Board of Arbitrator and Mediator Certification if the neutral desires to be added to or deleted from the Roster. The Board and clerk of court for each county shall make this roster available to the public.

(c) Appointment of Mediator by Circuit Court. In circuit court cases subject to ADR in which no Proof of ADR has been filed on the 210th day

after the filing of the action, the Clerk of Court shall appoint a primary mediator and a secondary mediator from the current Roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed. A Notice of ADR appointing the mediators shall be issued upon a form approved by the Supreme Court or its designee. In the event of a conflict of interest with the primary mediator, the secondary mediator shall serve. In the event of a conflict of interest with the secondary mediator, and if the parties have not agreed to the selection of an alternative mediator, the plaintiff or the plaintiff's attorney shall immediately file with the Clerk of Court a written notice advising the court of this fact and requesting the appointment of two more mediators. In lieu of mediation, the parties may select non-binding arbitration or early neutral evaluation pursuant to these rules.

In medical malpractice cases subject to pre-suit mediation as required by S.C. Code § 15-79-125(C), the Notice of Intent to File Suit shall be filed in accordance with procedures for filing a lis pendens and requires the same filing fee as provided by S.C. Code § 8-21-310(11)(b). The Notice of Intent to File Suit shall contain language directed to the defendant(s) that the dispute is subject to pre-suit mediation within 120 days and must contain a place for the names of the primary and secondary mediators. At the time the Notice of Intent to File Suit is filed, the Clerk of Court shall appoint a primary mediator and a secondary mediator in the manner set forth in the paragraph above. The plaintiff shall serve the defendants with the Notice of Intent to File Suit containing the mediator appointment. Notwithstanding the clerk's appointments, the parties by agreement may choose a different mediator at any time.

(d) Appointment of Mediator by Family Court. In family court cases subject to ADR, early mediation is encouraged.

(1) If there are unresolved issues of custody or visitation, an early mediation of those issues is required. In such event, the court shall appoint a mediator at a temporary hearing. If there is no temporary hearing, then the parties shall agree upon a mediator or notify the court for the appointment of a mediator within fifteen (15) days of the joinder of the issues of custody or visitation. In the event a mediation has not

already been held to attempt resolution of the issues of custody and visitation, the temporary order shall designate a mediator in language substantially complying with the form approved by the Supreme Court or its designee. The designation shall include the name, address and phone number of the primary mediator, whether the mediator was selected or appointed, and if appointed, the name, address and phone number of a secondary mediator. E-mail addresses shall be included, if available.

(2) If issues other than custody or visitation are in dispute and no Proof of ADR has been filed certifying that the issues have been mediated, the parties must mediate those issues prior to the scheduling of a hearing on the merits; provided, however, the parties may submit the issues of property and alimony to binding arbitration in accordance with subparagraph (5). A mediator shall be designated in the following manner:

> (A) When the parties file a request for a merits hearing, the request shall include the name of the stipulated mediator or a request for appointment of a mediator. The court shall not schedule a hearing on the merits until a Proof of ADR has been filed.
>
> (B) If a mediator has not been stipulated in the request for merits hearing, the clerk of court shall appoint a primary mediator and a secondary mediator from the current Roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed. A Notice of ADR appointing the mediators shall be issued upon a form approved by the Supreme Court or its designee.

(3) In the event of a conflict of interest with the primary mediator, the secondary mediator shall serve. In the event of a conflict of interest with the secondary mediator, and if the parties have not agreed to the selection of an alternative mediator, the plaintiff or the plaintiff's

attorney shall immediately file with the Clerk of Court a written notice advising the court of this fact and requesting the appointment of two more mediators.

(4) An initial mediation conference must occur within thirty (30) days of appointment or selection. The parties must complete mediation and file a Proof of ADR with the clerk's office before a merits hearing can be scheduled.

(5) In lieu of mediation, the parties may elect to submit issues of property and alimony to binding arbitration in accordance with the Uniform Arbitration Act, S.C. Code § 15-48-10 et seq., or submit all issues to early neutral evaluation pursuant to these rules.

(e) By agreement. By agreement, the parties may choose a neutral at any time. In any event, the ADR conference shall be held on or before the deadlines provided for in these rules.

(f) Notice to Neutral. The parties shall notify the selected or appointed neutral to initiate scheduling of the ADR Conference.

Rule 9
Compensation of Neutral

(a) By Agreement. When the parties stipulate the neutral, the parties and the neutral shall agree upon compensation.

(b) By Court Order – Mediation. When the mediator is appointed by the court, the mediator shall be compensated by the parties at a rate of $175 per hour, provided that the court-appointed mediator shall charge no greater than one hour of time in preparing for the initial mediation conference. Travel time shall not be compensated. Reimbursement of expenses to the mediator shall be limited to: (i) mileage costs accrued by the mediator for travel to and from the mediation conference at a per mile rate that is equal to the standard business mileage rate established by the Internal Revenue Service, as

periodically adjusted; and (ii) reasonable costs advanced by the mediator on behalf of the parties to the mediation conference, not to exceed $150. An appointed mediator may charge no more than $175 for cancellation of an ADR Conference.

(c) Payment of Compensation by the Parties. Unless otherwise agreed to by the parties or ordered by the court, fees and expenses for the ADR conference shall be paid in equal shares per party. Payment shall be due upon conclusion of the conference unless other arrangements are made with the neutral, or unless a party advises the neutral of his or her intention to file a motion to be exempted from payment of neutral fees and expenses pursuant to Rule 9(d).

(d) Indigent Cases. Where a mediator has been appointed, a party may move before the Chief Judge for Administrative Purposes to be exempted from payment of neutral fees and expenses based upon indigency. Applications for indigency shall be filed no later than ten (10) days after the ADR conference has been concluded. Determination of indigency shall be in the sole discretion of the Chief Judge for Administrative Purposes.

Rule 14
Description of Early Neutral Evaluation (ENE)

In early neutral evaluation, the parties and their counsel, in a confidential session, make compact presentations of their claims and defenses, including applicable evidence as developed at the time of the evaluation, and receive a non-binding evaluation of the matters in controversy by an evaluator. The evaluator also assists in identifying areas of agreement, offers case planning suggestions and assists the parties in settlement discussions.

Rule 15
Procedure at Early Neutral Evaluation Conference

(a) Components of ENE Session. The evaluator shall to the extent deemed appropriate by the evaluator:

(1) Permit each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

(2) Assist the parties to identify areas of agreement and, where feasible, enter stipulations;

(3) Assess the relative strength and weakness of the parties' contentions and evidence and provide detailed explanations to support these assessments;

(4) In a circuit court case, estimate, where feasible, the likelihood of liability and the dollar range of damages;

(5) In a family court case, evaluate the likely result of a trial of all issues.

(6) Assist the parties to devise a plan for sharing all relevant information and/or conducting the necessary discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;

(7) Assist the parties to assess litigation costs realistically;

(8) Assist the parties, through private caucusing and otherwise, to explore the possibility of settling the case;

(9) Determine whether further action after the session would contribute to the case development process or to settlement.

(b) Process Rules. The session shall be informal. Rules of Evidence shall not apply. There shall be no formal examination or cross-examination of witnesses, and no recording of the presentations or discussion shall be made.

(c) Evaluation and Settlement Discussions. The evaluation must be presented orally, and written copies of the evaluation may be provided to the parties at the discretion of the evaluator. The parties should discuss settlement after the evaluation has been presented.

(d) Confidentiality. Rule 8 of the ADR Rules shall apply to early neutral evaluations.

Rule 16
Duties of the Parties, Representatives and Attorneys – Early Neutral Evaluation

(a) Attendance. Attendance shall be required pursuant to Rule 6(b) of these rules.

(b) Identification of Matters in Dispute. The evaluator may require, prior to the scheduled early neutral evaluation conference, that each party provide a brief memorandum setting forth its position with regard to the issues to be resolved. The memorandum should be no more than five (5) pages in length unless otherwise authorized by the evaluator. Such memoranda shall be exchanged by the parties at the same time and in the same manner as the memoranda are furnished to the evaluator.

(c) Cooperation. The parties and their representatives shall cooperate with the evaluator.

Rule 17
Authority and Duties of the Evaluator

(a) The evaluator shall at all times be authorized to control the conference and the procedures to be followed.

(b) Duties. The evaluator shall set up the evaluation conference and shall define and describe the following to the parties:

(1) The early neutral evaluation process, including the difference between early neutral evaluation and other forms of conflict resolution;

(2) The duties and responsibilities of the evaluator and the parties; and

(3) The cost of the early neutral evaluation conference.

(c) Evaluator Not to be Called as a Witness. The evaluator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the early neutral evaluation in any adversary proceeding or judicial forum. All records, reports and other documents received by the evaluator while serving in that capacity shall be confidential.

(d) Duty of Impartiality/Disclosure. The evaluator has a duty to be impartial and to disclose any circumstance likely to affect impartiality or independence, including any bias, prejudice, or financial or personal interest in the result of the evaluation or any past or present relationship with the parties or their representatives.

(e) Reporting Results of the Early Neutral Evaluation. Within ten days of conclusion of the early neutral evaluation, as set forth in Rule 7(f), the evaluator shall file with the clerk of court proof of ADR on a form approved by the Supreme Court or its designee. South Carolina Court Administration or the South Carolina Commission on Alternate Dispute Resolution may require the evaluator to provide additional statistical data for evaluation of the program.

(f) Immunity. The evaluator shall have immunity from liability to the same extent afforded judicial officers of this State.

Rule 18
Board of Arbitrator and Mediator Certification

There is hereby established a Board of Arbitrator and Mediator Certification. The Board will be composed of five (5) persons appointed by the Supreme Court for a term of three (3) years or until a replacement member is appointed. In the event of a vacancy on the Board, the Supreme Court shall appoint someone to fill the unexpired term. Three members of the Board shall constitute a quorum. In the event that members of the Board disqualify themselves in a pending matter leaving less than a quorum, the Supreme Court may appoint ad hoc members to restore the Board to full membership in that matter.

Rule 19
Certification of Court-Appointed Neutrals

The Board of Arbitrator and Mediator Certification ("Board") shall receive and approve applications for certifications of persons to be appointed as mediators or arbitrators. The application shall be on a form approved by the Supreme Court or the Board. Recertification of a neutral who, by virtue of current job restrictions is prohibited from serving under these rules, is allowed if the neutral submits the appropriate recertification paperwork, pays the applicable fee and agrees upon termination of the prohibiting employment to promptly supplement the application to list at least one county for court appointments.

(a) Circuit Court Certification. For circuit court certification, a person must:

(1) Either:

(A) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar; or

(B) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and:

(i) Be at least 21 years old;

(ii) Have received a juris doctorate degree or its equivalent from a law school approved by the American Bar Association;

(iii) Be a member in good standing in each jurisdiction where he or she is admitted to practice law; and

(iv) Agree to be subject to the Rules of Professional Conduct, Rule 407, SCACR, and the Rule on Disciplinary Procedure, Rule 413, SCACR, to the same extent as an active member of the South Carolina Bar.

(2) Be of good moral character;

(3) Have not, within the last five (5) years, been:

(A) Disbarred or suspended from the practice of law;

(B) Denied admission to a bar for character or ethical reasons; or

(C) Publicly reprimanded or publicly disciplined for professional conduct;

(4) Pay all administrative fees and comply with all procedures established by the Supreme Court, the Board and the Commission on Alternative Dispute Resolution; and

(5) Agree to provide mediation/arbitration to indigents without pay.

(6) To be certified as a Mediator, a person must also:

(A) Have completed a minimum of forty (40) hours in a civil mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board; and

(B) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in South Carolina.

(7) To be certified as an Arbitrator, a person must also:

(A) Have served as a Master-in-Equity, Circuit or Appellate Court Judge; or

(B) Have completed a minimum of six (6) hours in a civil arbitration training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board; and

(C) Demonstrate familiarity with the statutes, rules and practice governing arbitration hearings in South Carolina;

(b) Family Court Mediator Certification. For family court mediator certification, a person must:

(1) Either:

(A) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar;

(B) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and:

(i) Be at least 21 years old;

(ii) Have received a juris doctorate degree or its equivalent from a law school approved by the American Bar Association;

(iii) Be a member in good standing in each jurisdiction where he or she is admitted to practice law; and

(iv) Agree to be subject to the Rules of Professional Conduct, Rule 407, SCACR, and the Rule on Disciplinary Procedure, Rule 413, SCACR, to the same extent as an active member of the South Carolina Bar; or,

(C) Be a psychologist, master social worker, independent social worker, professional counselor, licensed professional counselor intern, associate counselor, marital and family therapist, or physician specializing in psychiatry, licensed for at least three (3) years under Title 40 of the 1976 Code of Laws, as amended.

(2) Have completed a minimum of forty (40) hours in a family court mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board;

(3) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in South Carolina;

(4) Be of good moral character;

(5) Have not, within the last five (5) years, been:

(A) Disbarred or suspended from the practice of law or a profession set forth in Rule 15(b)(1)(C);

(B) Denied admission to a bar or denied a professional license for character or ethical reasons; or

(C) Publicly reprimanded or publicly disciplined for professional conduct;

(6) Pay all administrative fees and comply with all procedures established by the Supreme Court, the Board and the Commission on Alternative Dispute Resolution; and

(7) Agree to provide mediation to indigents without pay.

Rule 20
Approval of Training Programs

A training program, including the trainers to be utilized, must be approved by the Supreme Court or its designee, the Board of Arbitrator and Mediator Certification, before the program can be used for compliance with Rule 19(a)(6)(A) (certification of circuit court mediators), Rule 19(b)(2) (certification of family court mediators), or Rule 19(a)(7)(B) (certification of circuit court arbitrators). Approval need not be given in advance of training attendance. The Supreme Court may set administrative fees, which must be paid in advance of approval.

(a) Approval of Circuit Court Mediator Training Programs

(1) An approved training program for mediators of the Court of Common Pleas civil actions shall consist of a minimum of forty (40) hours of instruction, unless otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

(A) Conflict resolution and mediation theory;

(B) Mediation processes and techniques, including the process and techniques of trial court mediation;

(C) Standards of conduct and ethics for mediators;

(D) Statutes, rules and practice governing mediation settlement conferences in South Carolina;

(E) Demonstrations of mediation settlement conferences;

(F) Simulations of mediation settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(G) Such other requirements as the Supreme Court from time to time may decide are appropriate.

(2) Training programs completed in South Carolina or other states may be approved by the Board if:

(A) The program consisted of a minimum of 37 hours of instruction;

(B) The program covered all the topics enumerated in paragraph (a)(1) of this Rule except subparagraph (D) related to South Carolina law; and

(C) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or the Board, covering the South Carolina law topics enumerated in paragraph (a)(1), subparagraph (D) of this Rule.

(b) Approval of Family Court Mediator Training Programs

(1) An approved training program for mediators in the Family Court shall consist of a minimum of forty (40) hours of instruction, unless otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

(A) Statutes, rules and practice concerning family and related law in South Carolina, including the law regarding custody, visitation, support, division of property and alimony;

(B) Conflict resolution, family dynamics, and mediation theory in general, as well as specific training regarding domestic violence;

(C) Mediation processes and techniques, including the process and techniques of trial court mediation;

(D) Standards of conduct and ethics for mediators;

(E) Statutes, rules and practice governing mediation settlement conferences in South Carolina;

(F) Demonstrations of mediation conferences;

(G) Simulations of mediation settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(H) Such other requirements as the Supreme Court from time to time may decide are appropriate for good instruction.

(2) Training programs completed in South Carolina or other states may be approved by the Board if:

(A) The program consisted of a minimum of 37 hours of instruction;

(B) The program covered all the topics enumerated in paragraph (b)(1) of this Rule except subparagraphs (A) and/or (E) related to South Carolina law; and

(C) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or the Board, covering the South Carolina law topics enumerated in paragraph (b)(1), subparagraphs (A) and (E) of this Rule.

(c) Approval of Circuit Court Arbitrator Training Programs

(1) An approved training program for arbitrators of the Court of Common Pleas civil actions shall consist of a minimum of six (6) hours of instruction, unless otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

(A) Conflict resolution and arbitration theory;

(B) Arbitration processes and techniques, including the process and techniques of both binding and non-binding arbitration;

(C) Standards of conduct and ethics for arbitrators;

(D) Statutes, rules and practice governing arbitration hearings in South Carolina;

(E) Demonstrations of arbitration hearings; and

(F) Such other requirements as the Supreme Court from time to time may decide are appropriate.

(2) Training programs completed in South Carolina or other states may be approved by the Board if:

(A) The program consisted of a minimum of 6 hours of instruction;

(B) The program covered all the topics enumerated in paragraph (c)(1) of this Rule except subparagraph (D) related to South Carolina law; and

(C) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or the Board, covering the South Carolina law topics enumerated in paragraph (c)(1), subparagraph (D) of this Rule.

(d) Approval of ADR Trainers. An experienced, qualified faculty of trainers is essential to the success of any ADR training program. An applicant must specify those individuals who, in fact, will serve as the primary trainers for that training program. The application material shall also include a resume for each primary trainer, and each resume shall describe in detail the trainer's experience and education in ADR, along with other relevant experience.

The Supreme Court or the Board may use the following guidelines, without limitation, in exercising their discretion in approving trainers:

(1) The trainer should meet the equivalent education requirements set out in the corresponding category for certification.

(2) The trainer should have ADR training equivalent to that set out in the corresponding category for certification.

(3) The trainer should have served as a neutral in a minimum of twenty-five (25) ADR conferences since the time of his/her training, and should be actively engaged in the practice or academic instruction of ADR.

(4) In addition to meeting all academic, training and experiential requirements set out in these guidelines, the primary trainer should be knowledgeable in all areas of the training curriculum. If the primary

trainer lacks sufficient expertise or knowledge of any part of the required curriculum, he/she must bring in faculty who has expertise in that subject matter.

Rule 21
Standards of Conduct, Decertification and Discipline of Neutrals

(a) Standards of Conduct for Mediators. Any person serving as a mediator, whether certified or not, shall comply with the Standards of Conduct for Mediators, which is attached as Appendix B to these rules.

(b) Standards of Conduct for Arbitrators. Any person serving as an arbitrator, whether certified or not, shall comply with the Code of Ethics for Arbitrators, which is attached as Appendix A to these rules.

(c) Decertification of Neutrals. Certification under Rule 19 may be revoked at any time if it is shown that the neutral no longer meets the requirements to be certified under Rule 19 or that the neutral has failed to faithfully observe these rules, the ethical standards of Rules 21(a) or (b), or has engaged in any conduct showing an unfitness to serve as a neutral.

(d) Discipline of Neutrals. A neutral who violates these rules, the ethical standards of Rules 21(a) or (b), or who has engaged in any conduct showing an unfitness to serve as a neutral may, in addition to decertification under Rule 21(c), be subject to discipline by the Supreme Court. This discipline may include any sanction the Supreme Court determines is appropriate, to include an order publicly reprimanding the neutral for the conduct, an order barring the neutral from serving as a neutral in any court of this State for a definite or indefinite period of time, an order requiring the neutral to complete additional training, and/or the assessment of a fine. The fact that discipline is taken against an attorney under this Rule shall not preclude action against the attorney under Rule 413, SCACR, if the conduct is misconduct under that rule. The fact that discipline is taken under this Rule against a licensed professional listed in Rule 19(b)(1)(C) shall not preclude

action against the professional under the rules or statutes governing that profession, if the conduct is misconduct under that rule or statute.

(e) Processing Complaints of Misconduct by Neutrals. Persons alleging that a neutral has engaged in misconduct may file a complaint with the Board of Arbitrator and Mediator Certification. Misconduct includes any conduct or other circumstances that would warrant decertification or discipline under Rule 21(c) or (d). Complaints of misconduct shall be investigated by the Board and, upon a finding of probable cause, forwarded to the Commission on Alternate Dispute Resolution for a hearing before a Hearing Panel consisting of three (3) members of the Commission. Subject to the requirements of Rule 422(d), SCACR, the Commission shall promulgate regulations governing the processing of these complaints.

Rule 22
Clerks of Court

All circuit and family court Clerks of Court in each county shall perform whatever duties are required pursuant to these rules relating to record keeping, notification to the court, parties, or attorneys, docket control, maintenance of rosters, and service of orders.

Rule 23
Local Rule-Making

These rules shall be uniform for all counties in which they are applicable. Local rules may be allowed only upon approval of the Supreme Court. Unless otherwise specified by these rules, all motions related to ADR or to these rules should be directed to the Chief Judge for Administrative Purposes.

Rule 24
Application of Rules

These rules shall apply to cases filed in circuit or family court on or after the effective date of any statute mandating ADR or Supreme Court order designating that county or court as subject to these rules.

The Supreme Court of South Carolina

RE: Amendments to South Carolina Rules of Family Court

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Rules of Family Court are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2012

RULE 14
RULE TO SHOW CAUSE

(a) For Contempt of Court. Except for direct contempt of court, contempt of court proceedings shall be initiated only by a rule to show cause duly issued and served in accordance with the provisions hereof.

Note:

The long established procedural vehicle to bring a party into court for contempt proceedings has been the rule to show cause.

Direct contempt is an act committed in the presence of the Court while it is in session. A person may be held in direct contempt if his/her conduct interferes with judicial proceedings, exhibits disrespect for the Court, or hampers the parties or witnesses. *Stone v. Reddix-Smalls*, 295 S.C. 514, 369 S.E.2d 840 (1988). Direct contempt is usually resolved by the trial judge during the regular proceeding already in session.

The rule to show cause provided herein is for contempt of court arising from failure to comply with the Court's orders, decrees or judgments and for enforcement thereof. This form of contempt is known as constructive contempt of court.

(b) Issuance; Form. A rule to show cause for contempt of court shall be issued by a Family Court judge, except as provided by Rules 24 and 27, SCRFC. The rule to show cause shall be signed by the issuing judge with the date of issuance and shall require the responding party to appear in court, at a clearly stated date, time and place, to show cause why the responding party should not be held in contempt and why permissible relief requested by the moving party should not be granted.

Note:

Rules to show cause brought pursuant to Rules 24 and 27, SCRFC, are issued by the clerk of court for enforcement of support and for enforcement of visitation or child custody rights, respectively.

Requiring the rule to show cause in Rule 14, SCRFC, to set forth the date, time and place of the contempt hearing satisfies rudimentary due process requirements. "Permissible relief" is relief normally incident to contempt of court proceedings, such as enforcement of court orders, decrees and judgments and awarding compensatory contempt damages. The judge issuing the rule to show cause is empowered to strike from the rule any request for relief not normally incident to contempt proceedings; *e.g.*, modification (by either decrease or increase) of the child support amount. Such matters should be brought before the court by the filing of a Summons and Complaint as in any other modification action. However, in furtherance of justice and to serve the best interests of children, the judge should be able to consider, in his/her discretion, reasonable requests, *e.g.*, the imposition of a restraining order or modification of visitation. *See* Rule 27(d), SCRFC.

(c) Affidavit or Verified Petition. No rule to show cause shall be issued unless based upon and supported by an affidavit or verified petition, or unless issued by the judge *sua sponte*. The supporting affidavit or verified petition shall identify the court order, decree or judgment which the responding party has allegedly violated, the specific act(s) or omission(s) which constitute contempt, and the specific relief which the moving party is seeking. Such court order, decree or judgment shall be attached to the affidavit or certified petition.

Note:

Requiring an affidavit or verified petition is consistent with manifest case law and other procedural rules.

A rule to show cause issued to initiate contempt proceedings must be based upon an affidavit or verified "petition." *State v. Johnson*, 249 S.C. 1, 152 S.E.2d 669 (1967). The failure to support the rule to show cause by an affidavit or verified petition "is a fatal defect." *Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) (citing *State v. Blackwell*, 10 S.C. 35 (1878)). *See Brasington v. Shannon*, 288 S.C. 183, 341 S.E.2d 130 (1986) and *Hornsby v. Hornsby*, 187 S.C. 463, 198 S.E. 29, 32 (1938). Requiring the supporting affidavit or verified petition in Rule 14, SCRFC,

satisfies due process concerns by ensuring that rules to show cause will only be issued with clear, specific allegations being set forth for the court and the responding party.

(d) Notice. The rule to show cause, and the supporting affidavit or verified petition, shall be served, in the manner prescribed herein, not later than ten days before the date specified for the hearing, unless a different notice period is fixed by the issuing judge within the rule to show cause. In an emergency situation, the notice period of ten days may be reduced by the issuing judge.

Note:

Requiring that rules to show cause be served with the supporting affidavit or verified petition and providing for ten days' notice are consistent with standard motion practice as provided by Rule 6(d), SCRCP. These requirements will also help alleviate the "surprise" problems which have plagued contempt proceedings, thereby satisfying due process. Nevertheless, the rights of the moving party are not ignored as the issuing judge has the discretion to shorten the notice period in emergencies.

(e) Service. The rule to show cause shall be served with the supporting affidavit or verified petition by personal delivery of a duly filed copy thereof to the responding party by the Sheriff, his deputy or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action.

Note:

The manner of service provided by Rule 14, SCRFC, is consistent with standard practice in all courts as provided by Rules 4(c) and 4(d), SCRCP, with the exception that the rule to show cause and supporting affidavit or verified petition are to be served by personal delivery upon the responding party.

Personal service as specified within Rule 14(e) ensures due process by facilitating reliable service directly upon the responding party.

(f) Return. If at the contempt proceeding the responding party intends to seek counsel fees and costs, or other appropriate relief permitted by law, then he shall serve a return to the rule to show cause prior to the commencement of the hearing, unless a Family Court judge requires a return to be served at some other time. The responding party's failure to serve a return does not relieve the moving party from the burden of establishing contempt of court.

Note:

The requirement of a return satisfies the due process rights of the moving party, thereby balancing the protection for the responding party provided elsewhere by Rule 14, SCRFC. Serving a return is analogous to the required service of an answer or reply or responsive affidavits in other litigation, and provides the moving party with some notice of the responding party's defense to the contempt allegations.

(g) Hearing Procedure. The contempt hearing shall be an evidentiary hearing with testimony pursuant to the Rules of Evidence, except as modified by the Family Court Rules. At the contempt hearing, the moving party must establish a prima facie case of willful contempt by showing the existence of the order of which the moving party seeks enforcement, and the facts showing the respondent's noncompliance. The moving party shall satisfy the burden of proof required by law for the specific nature of contempt before the court. Once the moving party establishes a prima facie case, the respondent is entitled to present evidence of a defense or inability to comply with the order. If requested, the Court may allow reply testimony. The Court may impose sanctions provided by law upon proper showing and finding of willful contempt, and may award other appropriate relief properly requested by a party to the proceeding.

Note:

In *Poston v. Poston*, 331 S.C. 106, 502 S.E.2d 86 (1998), the Supreme Court defined civil contempt of court and criminal contempt of court, and clarified the separate burden of proof for both forms of contempt. Requiring the moving party to meet the burden of proof at the contempt hearing is consistent with *Brasington v. Shannon*, 288 S.C. 183, 184, 341

S.E.2d 130, 131 (1986) (In a proceeding for contempt for violation of a court order, the moving party must show the existence of the order and the facts establishing the respondent's noncompliance. The burden then shifts to the respondent to establish his defense and inability to comply with the order.); *Messer v. Messer*, 359 S.C. 614, 598 S.E.2d 310 (Ct. App. 2004); *Widman v. Widman*, 348 S.C. 97, 557 S.E.2d 693 (Ct. App. 2001); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997).

Even though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion. *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) (citing *Sutton v. Sutton*, 291 S.C. 401, 409, 353 S.E.2d 884, 888 (Ct. App. 1987)). Statutory sanctions for contempt are enumerated at S.C. Code Ann. § 63-3-620 (Supp. 2010).

The court may also award compensatory contempt damages to the moving party. Compensatory contempt seeks to reimburse the party for the costs he or she incurs in forcing the non-complying party to obey the court's orders. *See Poston v. Poston*, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998) ("In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding."); *Lindsay v. Lindsay*, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997) ("A compensatory contempt award may include attorney fees."); *Curlee v. Howle*, 277 S.C. 377, 386-87, 287 S.E.2d 915, 919-20 (1982) ("Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order." "Included in the actual loss are the costs of defending and enforcing the court's order, including litigation costs and attorney's fees.").

In furtherance of justice and to serve the best interests of children, the judge should be able to consider, in his/her discretion, appropriate requests, *e.g.*, the imposition of a restraining order or modification of visitation. *See* Rule 27(d), SCRFC (court may modify prior order's provisions in visitation enforcement proceedings).

The Supreme Court of South Carolina

RE: Amendments to South Carolina Rules of Probate Court

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Rules of Probate Court are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2012

Rule 5
MEDIATION

(a) Intent and Application of Rule. The purpose of mediation is to provide parties with an alternative to litigation. This rule shall apply to all cases referred to mediation in the Probate Courts of this State and shall be uniform for all counties.

(b) Referral to Mediation

(1) All contested litigation within the jurisdiction of the Probate Court shall be eligible for referral to mediation.

(2) Actions may be referred to mediation in the following manner:

(A) by court order after the filing of a motion by a party;

(B) by written stipulation of all parties; or

(C) upon the court's own motion with notice to all parties.

(3) Within ten (10) days after receipt of a motion requesting mediation, any party opposing mediation must file a written objection with the court setting forth specific reasons why mediation is not appropriate. If a written objection is filed, the court may hold a hearing at which time the objecting party must provide good cause demonstrating why mediation is not appropriate.

(c) Assignment of Mediator

(1) By agreement, the parties may select any person to serve as mediator who in the opinion of all parties is qualified by training or experience to mediate all or some of the issues in the matter. The parties shall file a signed stipulation indicating the name of the mediator within twenty (20) days after the matter has been

referred to mediation. When the parties select the mediator, the parties and the mediator shall agree upon the mediator's compensation.

(2) If the parties have not agreed upon a mediator within twenty (20) days of the referral to mediation, the court shall appoint a primary and alternate mediator from the list of certified Circuit Court or Family Court mediators maintained by the South Carolina Bar under Rule 19, S.C. Court-Annexed ADR Rules, and shall give notice to all parties.

(3) Unless otherwise agreed by the parties or ordered by the court, fees and expenses for the mediation conference shall be paid in equal shares per party. However, upon motion of any party, the Probate Court may order reimbursement of mediator fees and expenses from an estate upon a showing that the mediation process significantly benefitted the estate. A party may also move before the court to be declared indigent and exempted from payment of mediator fees and expenses. A party may also move before the court to allow mediation to be conducted by a community mediation center due to the modest value of the estate.

(d) The Mediation Conference

(1) The mediation conference is to be held in the county where the case is pending, unless otherwise agreed by the parties and the mediator.

(2) Consistent with Rule 6(b), S.C. Court-Annexed ADR Rules, physical attendance at the mediation conference shall be required for all non-defaulting parties who are affected by the litigation.

(3) The mediation conference shall be held within sixty (60) days of referral to mediation. Failure to complete mediation in a timely manner may result in sanctions from the court.

(4) Within ten (10) days after the conclusion of the mediation process, the mediator shall file with the court a Proof of Mediation on a form approved by the Supreme Court or its designee.

(5) If a full or partial agreement is reached during the mediation conference, the agreement shall be reduced to writing signed by the parties. Within thirty (30) days of the conclusion of the mediation conference, the parties shall pursue court approval of the terms of the settlement through either the submission of a consent order or motion filed with the court.

(e) Confidentiality. Communications during the mediation conference shall be confidential to the same extent and in the same manner as set forth in Rule 8, S.C. Court-Annexed ADR Rules.

(f) Applicability of Other Rules. In addition, the following S.C. Court-Annexed ADR Rules approved by the Supreme Court shall apply to every matter referred to mediation in the Probate Courts of this State: Rule 5(a) – (d); Rule 6(a) – (e); Rule 7(a) – (e); Rule 7(g); Rule 8; Rule 9(a) – (c); and Rule 10(b).

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Appellate Court Rules

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 415(a) of the South Carolina Appellate Court Rules (SCACR) is amended to read as shown in the attachment to this order. This amendment is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 4, 2012

Amendment to Rule 415(a), SCACR

(a) The Supreme Court may issue a limited certificate to practice law in South Carolina to any person who:

(1) is or was admitted to practice law in South Carolina or any other state or territory of the United States or the District of Columbia and is retired from the active practice of law or is on inactive status;

(2) has been a member in good standing in each jurisdiction in which the retired or inactive attorney is or was admitted to practice law;

(3) has not been disciplined for professional misconduct in any jurisdiction within the past fifteen (15) years and is not the subject of any pending disciplinary proceeding;

(4) is associated with an approved legal services organization (Legal Services) which receives, or is eligible to receive, funds from the Legal Services Corporation; is working on a case or project through the South Carolina Bar Pro Bono Program (the Program); or is working with a program funded in whole or in part by a grant from the South Carolina Bar Foundation, Inc. (the Grantee), using interest and dividends remitted under the procedure established in Rule 412, SCACR;

(5) performs all activities authorized by this Rule under the supervision of an attorney who is an active member of the South Carolina Bar employed by, or participating as a volunteer for, Legal Services, the Program or the Grantee and who assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the retired or inactive attorney participates and;

(6) agrees to abide by the South Carolina Rules of Professional Conduct and all other rules governing the practice of law in this State and to submit to the jurisdiction of the Supreme Court for disciplinary purposes.

The Supreme Court of South Carolina

RE: Amendments to South Carolina Appellate Court Rules

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rules 405, 409, 410, 414, 415, 419 and 424 of the South Carolina Appellate Court Rules are amended to read as shown in the attachments to this order. These amendments shall be effective January 1, 2013.

These amendments shall govern the license fees for lawyers and foreign legal consultants that are due on January 1, 2013. The Attorney Information System shall incorporate the class and status for each attorney or foreign legal consultant as established under these amendments so that this information may be used by the South Carolina Bar when it creates the license fee statements for 2013.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 7, 2012

RULE 405
LIMITED CERTIFICATE OF ADMISSION FOR IN-HOUSE COUNSEL

(a) Qualifications for Admission. The Supreme Court may issue a limited certificate of admission to practice law in South Carolina to any person who:

(1) is at least twenty-one (21) years of age;

(2) is a person of good moral character;

(3) has received a JD or LLB degree from a law school which was approved by the Council of Legal Education of the American Bar Association at the time the degree was conferred;

(4) has been admitted to practice law in the highest court of another state or the District of Columbia;

(5) is a member in good standing in each jurisdiction where he is admitted to practice law;

(6) has not been disbarred or suspended from the practice of law and is not the subject of any pending disciplinary proceeding in any other jurisdiction;

(7) is employed in the legal department or under the supervision of the legal department of a corporation, company, partnership, or association (business employer) which does not provide legal services in South Carolina to the public or its employees. If not a South Carolina corporation, company, partnership or association, the business employer must be qualified or otherwise lawfully engaged in business in South Carolina;

(8) performs most of his duties for the business employer in South Carolina and has his principal office in South Carolina; and

(9) provides legal services in South Carolina solely for the business employer or the parent or subsidiary of such employer.

(b) Application. An attorney desiring a limited certificate of admission to practice law shall file with the Clerk of the Supreme Court an application in duplicate on a form prescribed by the Supreme Court. The application shall be accompanied by a certificate of good standing from each jurisdiction in which the attorney has been admitted to practice law, a non-refundable application fee of $400 and a statement signed by a representative of the attorney's business employer stating that the attorney and the business employer meet the requirements of subsections (a)(7) to (9) above.

(c) Reference to the Committee on Character and Fitness. Any questions concerning the fitness or qualifications of an attorney applying for a limited certificate of admission to practice law may be referred by the Court to the Committee on Character and Fitness for a hearing and recommendation.

(d) Confidentiality. The confidentiality provisions of Rule 402(n), SCACR, shall apply to all files and records of the Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to an application for a limited certificate to practice law under this rule.

(e) Scope of Practice. An attorney issued a limited certificate of admission to practice law may represent his employer:

(1) before any State agency in an administrative proceeding if authorized by the agency's regulations;

(2) before the magistrate's court in civil proceedings upon presentation of a copy of the certificate to the court;

(3) before any other South Carolina court or tribunal only if:

(A) he associates as co-counsel a member of the South Carolina Bar licensed under Rule 402. The associated attorney

shall be present at all trials, hearings, depositions, and other proceedings, and shall be required to sign all pleadings, motions, and other documents required to be signed by an attorney; and

(B) a copy of the certificate is presented to the court or other tribunal.

(f) Certain Activities Permitted. An attorney granted a limited certificate of admission to practice law is not prevented from appearing in any matter *pro se* or from fulfilling the duties of a member of the reserve components of the armed forces or the National Guard.

(g) Rights and Obligations. The performance of legal services in this State by an attorney issued a limited certificate of admission to practice law shall be deemed the active engagement in the practice of law and shall subject the attorney to all duties and obligations of regular members of the South Carolina Bar and to all rules on the practice of law, including the Rules of Professional Conduct, Rule 407, SCACR, the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. The attorney shall pay the fee specified by Rule 410, SCACR, and shall be subject to suspension under Rule 419, SCACR, for failing to pay those license fees or for failing to comply with continuing legal education requirements.

(h) Unauthorized Practice. If an attorney granted a limited certificate engages in the practice of law in excess of that permitted by this rule, the attorney may be subject to discipline under Rule 413, SCACR, a revocation of the limited certificate by the Supreme Court, or being held in contempt of the Supreme Court for engaging in the unauthorized practice of law.

(i) Misconduct and Incapacity. Except as otherwise provided in this rule, the procedures provided by Rule 413, SCACR, shall be used for resolving allegations that the attorney has committed ethical misconduct or suffers from a physical or mental condition which adversely affects the attorney's ability to practice law. If, however, the Supreme Court imposes a definite suspension or disbarment, or transfers the attorney to incapacity inactive status, the limited certificate shall be terminated as provided below. Unless otherwise ordered by the Court, the attorney may not seek to be readmitted as an attorney under this rule or any other rule until the period of

suspension has expired or, in the case of disbarment, until five years after the date of the opinion or order imposing the disbarment.

(j) Termination of Certificate. The limited certificate of admission to practice law shall terminate if:

(1) The limited certificate is revoked by the Supreme Court under (h) above.

(2) The attorney is admitted to practice law in South Carolina under Rule 402, SCACR, or is granted another limited certificate of admission to practice law under this or any other rule, or is licensed as a foreign legal consultant under Rule 424, SCACR.

(3) The attorney is suspended or disbarred in this or any other jurisdiction. This does not include interim suspensions under Rule 17 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, or a similar rule in another jurisdiction. For an administrative suspension under Rule 419, SCACR, the attorney may seek reinstatement as provided in that rule.

(4) The attorney fails at any time to be a member of the bar in good standing before the highest court of at least one other state or the District of Columbia.

(5) The attorney ceases to be an employee of the business employer.

(k) Resignation. Any request by an attorney licensed under this rule shall be processed as provided by Rule 409, SCACR.

(l) Surrender of Certificate. Upon the termination of the limited certificate of admission to practice law or the acceptance of a resignation, the attorney shall immediately surrender the certificate to the Clerk of the Supreme Court. The failure to immediately surrender the certificate upon termination or the acceptance of a resignation may subject the attorney to discipline under Rule 413, SCACR, or to being held in contempt of the Supreme Court.

(m) Eligibility to Provide Pro Bono Legal Services. An attorney granted a limited certificate to practice law under this Rule may, subject to the limitations contained in section (n) below, provide pro bono legal services if the attorney:

(1) is associated with an approved legal services organization which receives, or is eligible to receive, funds from the Legal Services Corporation or is working on a case or project through the South Carolina Bar Pro Bono Program;

(2) performs all activities authorized by this Rule under the supervision of an attorney (Supervising Attorney) who is a regular member of the South Carolina Bar employed by, or participating as a volunteer for, the legal services organization or the South Carolina Bar Pro Bono Program and who assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the attorney participates; and

(3) neither asks for nor receives compensation of any kind for the legal services provided to the client.

(n) Authorized Pro Bono Legal Services. In representing a client through an approved legal services organization or the South Carolina Bar Pro Bono Program, the attorney may:

(1) appear in any court or before any tribunal in this State if the client consents, in writing, to that appearance and the Supervising Attorney has given written approval for the appearance. The written consent and approval must be filed with the court or tribunal and must be brought to the attention of the judge or presiding officer prior to the appearance;

(2) prepare pleadings and other documents to be filed in any court or before any tribunal in this State on behalf of the client. Such pleadings shall also be signed by the Supervising Attorney; and

(3) otherwise engage in the practice of law as is necessary for the representation of the client.

(o) Conduct Prior to December 31, 1989. Notwithstanding any other provision of this Rule, the performance of legal services in this State solely for the corporation, company, partnership, or association prior to December 31, 1989, shall be deemed to have been the authorized practice of law in this State for all purposes if, at the time of the performance of the legal services, the attorney met the requirements of section (a) above.

RULE 409
RESIGNATION OF LAWYERS AND FOREIGN LEGAL CONSULTANTS

Any request by a person licensed under Rules 402, 405, 414, 415 or 424, SCACR, to resign shall be submitted in writing to the Supreme Court of South Carolina. This request shall contain a statement by the person acknowledging that if the resignation is accepted, the person will have to fully comply with all conditions of admission or licensing if that person should ever again seek to be admitted or licensed, including taking the South Carolina Bar Examination, if applicable. The request shall be referred by the Supreme Court to the Commission on Lawyer Conduct for a recommendation as to the propriety of accepting the resignation. The Court shall take such action on the resignation as it deems proper.

RULE 410
SOUTH CAROLINA BAR

(a) Name. There is hereby created and established an organization to be known as the South Carolina Bar.

(b) Purposes. The purposes of the organization shall be to uphold and defend the Constitution of the United States and the Constitution of the State of South Carolina; to protect, and maintain respect for, representative government; to continually improve the administration of justice throughout the State; to require the highest standards of ethical and professional conduct, and uphold the integrity and honor of the legal profession; to advance the science of jurisprudence; to promote consistent high quality of legal education and legal services to the public; to apply the knowledge, experience and ability of the legal profession to the promotion of the public good; to encourage goodwill and respect for integrity and excellence in public service among the members of the legal profession and the public; to perform any additional purposes and duties assigned to it by the Supreme Court of South Carolina; and to promote and correlate such policies and activities of the Bar as fall within these purposes in the interest of the legal profession and the public.

(c) Duties and Powers. The duties of the South Carolina Bar shall be to faithfully carry out its stated purposes as set forth in this rule as may be amended from time to time, with the powers as shall be reasonably necessary and proper for the carrying out of these purposes, including the power to adopt, and amend as necessary, the Bylaws by which it shall be governed, to recommend amendments or additions to this rule and to the Constitution approved by this Court, and to recommend changes in the license fees to be charged the members thereof.

(d) Membership. Except as otherwise provided in the rules of this Court, no person shall engage in the practice of law in the State of South Carolina who is not licensed by this Court and a member in good standing of the South Carolina Bar. Further, no person shall be a member of the South Carolina Bar who has not been licensed to practice law by this Court.

(e) Attorney Information System (AIS). The AIS is a web-based system developed by the South Carolina Judicial Department to maintain and update information regarding members of the South Carolina Bar. Members use this system, which is accessed using a user name and password, to verify and update their contact information, and view their membership class and status. The mailing and e-mail address shown in the AIS shall be used for the purpose of notifying and serving the member.

(f) Enrollment of Members and Duties Upon Enrollment. Every person admitted to the practice of law in South Carolina shall be added to the AIS immediately upon their admission. The Clerk of the Supreme Court is authorized to release information from the admissions/application records as necessary to populate the data fields in the AIS. Each new member shall verify and update their information in the AIS within five (5) days of being admitted or licensed. Additionally, the South Carolina Bar may require a new member to provide additional information on a form provided by the South Carolina Bar.

(g) Duty of Members to Verify and Update the AIS. Persons admitted to practice law in South Carolina shall have a continuing duty to verify and update their information contained in the AIS, and must ensure that the AIS information is current and accurate at all times. At a minimum, the contact information listed on the AIS must include a mailing address, an e-mail address and a telephone number. Members must update their contact information within five (5) days of any change. Additionally, members must verify and update all of their information prior to paying their bar license fees every year. For those fields that the member cannot correct or update using the AIS, the member will make and submit a discrepancy report on the AIS so that the matter can be resolved. Members who have resigned, been disbarred or suspended, or whose admission or license has otherwise been terminated, and who do not intend to ever seek reinstatement or readmission, are not required to update their information.

(h) Membership Classes. The membership classes within the South Carolina Bar shall be as follows:

(1) Persons Admitted Under Rule 402, SCACR. All persons who have been admitted to practice law under Rule 402 (or its predecessor rule) shall be divided into the following membership classes:

(A) Regular Member. Any member who does not fall within any other class of membership.

(B) Inactive Member. Any regular member who has elected to become an inactive member. Except as provided in section (q) below, an inactive member may not engage in the practice of law in South Carolina. If an inactive member has been engaged in the practice of a law in this or any other jurisdiction within the last twelve months, the inactive member may become a regular member by paying the fee specified in section (o) below if that member is current on mandatory continuing legal education requirements in that jurisdiction. Otherwise, the inactive member may only become a regular member by paying the fee specified in section (o) below and providing proof that the inactive attorney has completed the continuing legal education requirements of a regular member under Rule 408, SCACR, within the last twelve months.

(C) Judicial Member. This class shall include any member who:

(i) Is a full-time judge for a South Carolina court.

(ii) Was a member under (i) above, but has retired as a judge under a state or local retirement system, and has not engaged in the practice of law since retirement or elected to practice law under S.C. Code Ann. § 9-8-120.

(iii) Is a judge of a federal court (including those in senior status).

For the purpose of this rule, the term judge shall include a judge, justice, master-in-equity or magistrate.

(D) Judicial Staff Member. Any member who is a law clerk, staff attorney or other attorney employed full-time by:

(i) the South Carolina Judicial Department, or any court or judge within the South Carolina unified judicial system.

(ii) the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit or the Supreme Court of the United States.

(E) Military Member. Any member who is serving on active duty with the Armed Forces of the United States for six months or more, including members of the National Guard and other reserve components, and elects to become a military member. Military members may not engage in the practice of law in South Carolina outside of their duties in the Armed Forces of the United States.

(F) Administrative Law Judge Member. This class shall include any member who is a judge on the South Carolina Administrative Law Court or is a federal administrative law judge whose duties are primarily performed within the State of South Carolina.

(G) Retired Member. Any member who has elected to retire due to age, serious illness, or total and permanent disability. To be eligible for retired membership by reason of age, a member shall have attained age sixty-five or more; provided, however, that a member may elect to retire at the start of the license year in which the member will turn sixty-five years of age. Except as provided in section (q) below, a retired member may not engage in the practice of law in South Carolina. After being in this status for more than two years, the member may not become a regular member without completing fourteen hours of continuing legal education, including two hours on legal ethics and professional responsibility.

(2) Limited Member. Any person who holds a limited certificate of admission to practice law in South Carolina. A person may hold only one limited certificate. Limited Members shall be further divided into the following subclasses:

(A) Limited Member – Rule 405 (Limited Certificate of Admission for In-House Counsel). Any person who holds a limited certificate under Rule 405, SCACR.

(B) Limited Member - Rule 414 (Limited Certificate of Admission for Clinical Law Program Teachers). Any person who holds a limited certificate under Rule 414, SCACR

(C) Limited Member – Rule 415 (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program). Any person who holds a limited certificate under Rule 415, SCACR.

(i) Status. In addition to having a membership class, each member or former member of the South Carolina Bar shall have a status as set forth below. A member who is deceased shall maintain the status that the member held on the date of death.

(1) Status of Persons Admitted Under Rule 402, SCACR.

(A) Good Standing. A member who does not have any other status listed below.

(B) Resigned. A member whose resignation has been accepted by the Supreme Court under Rule 409, SCACR. Members in this status do not pay license fees.

(C) Not in Good Standing. A member is not in good standing if:

(i) The member is administratively suspended under Rule 419, SCACR.

(ii) The member's membership is administratively terminated under Rule 419, SCACR.

(iii) The member is suspended under Rule 413, SCACR. This includes interim suspensions.

(iv) The member is on incapacity inactive status under Rule 413, SCACR. This includes interim suspensions based on incapacity.

(v) The member is disbarred under Rule 413, SCACR.

(vi) The member's admission has been vacated under Rule 402(h) or (i)(8), SCACR.

(2) Status of Limited Members.

(A) Good Standing. A limited member who does not have one of the statuses listed below.

(B) Resigned. A limited member whose resignation has been accepted by the Supreme Court under Rule 409, SCACR.

(C) Certificate Not Currently Valid. A limited member who is on interim suspension under Rule 413, SCACR, including an interim suspension for incapacity, or whose certificate is terminated for any of the reasons stated in Rule 405, 414 or 415, as applicable.

(j) License Fees. The membership year shall be the calendar year. By January 1st, each member who is in good standing (other than deceased members) shall pay the South Carolina Bar the fees specified in this section and in section (k) below. All income and assets shall be handled separately by the South Carolina Bar, as prescribed in its Constitution and Bylaws. For the purpose of this rule, the term "license fee" shall include any assessment under Rule 411, SCACR.

(1) Regular Member. The license fee for a regular member who has been admitted to practice law in this State or any other jurisdiction for less than three years shall be $175. The license fee for all other regular members shall be $245. In addition, the license fee of a regular member shall include the Lawyer's Fund for Client Protection assessment specified by Rule 411, SCACR. Finally, each regular member shall pay $30 which shall be designated for meeting the civil legal needs of indigents as directed by the Board of Governors of the Bar, but any member may deduct this fee before remitting payment.

(2) Inactive Member. The license fee shall be $175.

(3) Judicial Member. The license fee shall be $175.

(4) Judicial Staff Member. The license fee shall be $175.

(5) Military Member. The license fee for a military member shall be $175. This fee shall be waived during a time of war declared by the Congress of the United States and, upon written request, shall be waived when the member is serving on active duty in an area designated as a combat zone by the President of the United States.

(6) Administrative Law Judge Member. The license fee shall be $175.

(7) Retired Member. No fee is required.

(8) Limited Member. No fee shall be required for a person holding a limited certificate under Rule 415 (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program), SCACR. The license fee for all other persons holding a limited certificate shall be $245.

(k) Additional License Fee to Support Lawyer and Judicial Disciplinary Functions. Members in good standing (other than deceased members) shall also pay an additional fee which shall be placed in a separate account by the South Carolina Bar and shall be disbursed as directed by the Supreme Court to help defray the costs of operating the Commission on

Judicial Conduct, the Commission on Lawyer Conduct, and the Office of Disciplinary Counsel.

(1) Regular Member. The additional license fee for a regular member who has been admitted to practice law in this State or any other jurisdiction for less than three years shall be $20. The additional license fee for all other regular members shall be $50.

(2) Inactive Member. The additional license fee shall be $20.

(3) Judicial Member. The additional license fee shall be $50.

(4) Judicial Staff Member. The additional license fee shall be $50.

(5) Military Member. The additional license fee for a military member shall be $20. This fee, upon written request, shall be waived during a time of war declared by the Congress of the United States and, upon written request, shall be waived when the member is serving on active duty in an area designated as a combat zone by the President of the United States.

(6) Administrative Law Judge Member. The additional license fee shall be $50.

(7) Retired Member. No fee is required.

(8) Limited Member. No fee shall be required for a person holding a limited certificate under Rule 415 (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program), SCACR. The additional license fee for a person holding a limited certificate under Rules 405 (Limited Certificate of Admission for In-House Counsel) and 414 (Limited Certificate of Admission for Clinical Law Program Teachers), SCACR, shall be $20.

(l) Foreign Legal Consultants.

(1) Duty to Verify and Update the AIS. While not members of the South Carolina Bar, persons who are licensed as foreign legal

consultants under Rule 424, SCACR, shall be added to the AIS immediately upon their licensing, and the Clerk of the Supreme Court is authorized to release information from the admissions/application records as necessary to populate the data fields in the AIS. Foreign legal consultants shall have the same duty to update and verify their information on the AIS as specified for members under (f) and (g) above.

(2) License Fees. Foreign Legal Consultants who are in good standing (other than deceased consultants) shall pay a license fee of $295 to the South Carolina Bar by January 1st. Fifty dollars of this fee shall be placed in the separate account referenced in (k) above to be disbursed as directed by the Supreme Court to help defray the costs of operating the Commission on Judicial Conduct, the Commission on Lawyer Conduct, and the Office of Disciplinary Counsel.

(3) Status. A foreign legal consultant shall have a status as indicated below. A foreign legal consultant who is deceased shall maintain the status that the member held on the date of death.

(A) Good Standing. Any foreign legal consultant who does not have any other status listed below.

(B) Resigned. A foreign legal consultant whose resignation has been accepted by the Supreme Court.

(C) License Not Currently Valid. A foreign legal consultant who is on interim suspension under Rule 413, SCACR, including an interim suspension for incapacity, or whose license has been terminated for any of the reasons stated in Rule 424, SCACR.

(m) Penalty for Late Payment. If a member or foreign legal consultant fails to pay the license fees by January 31st, the fees shall be increased by fifty (50) percent.

(n) License Fees For New Admittees or Licensees. Persons admitted or licensed before July 1 of any calendar year, must pay one half of the license fee by July 1st of that year. Persons admitted or licensed on or after July 1st of

any calendar year, will pay no license fee for that year. For the purpose of this section, a person who is admitted under Rule 402, SCACR, shall be treated as a new admittee even if the person previously held a limited certificate to practice law or was licensed as a foreign legal consultant.

(o) License Fees Due Upon a Change in Membership Class. A member admitted under Rule 402, SCACR, who transfers from being an inactive member to being a regular member must pay the difference in the license fee for that year regardless of when the change occurs. Except as provided in section (n) above, no other change in membership class within a license year shall require the payment of any additional fee. No refund shall be provided based on a change in membership class.

(p) Return to Good Standing. A member or foreign legal consultant who is not in good standing is not obligated to pay license fees. If that person desires to return to good standing, the member must, in addition to any other requirement of reinstatement or readmission, pay the license fees for the year in which the member desires to be reinstated or readmitted if the fees have not already been paid for that year. If the member was suspended for non-payment of license fees, the member must also pay the delinquent fees and penalties which caused that suspension. Proof that these fees have been paid to the South Carolina Bar must accompany any petition for reinstatement or readmission.

(q) Pro Bono Participation by Inactive and Retired Members. An inactive or retired member as defined in section (h) above may provide pro bono legal services if:

(1) the member is associated with an approved legal services organization which receives, or is eligible to receive, funds from the Legal Services Corporation or is working on a case or project through the South Carolina Bar Pro Bono Program;

(2) performs all pro bono legal services under the supervision of an attorney (Supervising Attorney) who is a regular member of the South Carolina Bar employed by, or participating as a volunteer for, the legal services organization or the South Carolina Bar Pro Bono Program and who assumes professional responsibility for the conduct of the matter,

litigation, or administrative proceeding in which the attorney participates; and

(3) neither asks for nor receives compensation of any kind for the legal services provided to the client.

RULE 414
LIMITED CERTIFICATE OF ADMISSION FOR CLINICAL LAW PROGRAM TEACHERS

(a) Purpose. This rule is adopted to foster and aid the clinical law programs of law schools. These programs provide legal services to those who are unable to afford private legal counsel and educate law students in providing these legal services.

(b) Qualifications for Admission. The Supreme Court may issue a limited certificate of admission to practice law in South Carolina to any person who:

(1) is employed full-time by a law school within this State which has been approved by the American Bar Association and is responsible for supervising or teaching in the clinical law program operated by the law school;

(2) provides legal services solely in connection with the supervision of or instruction in the law school's clinical law program;

(3) neither requests nor receives compensation or remuneration of any kind for legal services from the person for whom the services are rendered;

(4) is at least twenty-one years of age;

(5) is a person of good moral character;

(6) has received a JD or LLB degree from a law school that was approved by the Council of Legal Education of the American Bar Association at the time the degree was conferred;

(7) has been admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years;

(8) is a member in good standing in each jurisdiction where he is admitted to practice law;

(9) has not been disbarred or suspended from the practice of law and is not the subject of any pending disciplinary proceeding in any other jurisdiction; and,

(10) has not, within the last five (5) years, been denied admission to a bar for character or ethical reasons or disciplined for professional misconduct.

(c) Application. An attorney desiring a limited certificate of admission shall file with the Clerk of the Supreme Court an application in duplicate on a form prescribed by the Supreme Court. The application shall be accompanied by a certificate of good standing from each jurisdiction in which the attorney has been admitted to practice law and a statement signed by the Dean of the law school at which the attorney is employed stating that the attorney meets the requirements of (b)(1)-(3) above.

(d) Reference to the Committee on Character and Fitness. Any questions concerning the fitness or qualifications of an attorney applying for a limited certificate of admission to practice law may be referred by the Court to the Committee on Character and Fitness for a hearing and recommendation.

(e) Confidentiality. The confidentiality provisions of Rule 402(n), SCACR, shall apply to all files and records of the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to an application for a limited certificate to practice law under this rule.

(f) Rights and Obligations. The performance of legal services in this State by an attorney issued a limited certificate of admission to practice law shall be deemed the active engagement in the practice of law and shall subject the attorney to all duties and obligations of regular members of the South Carolina Bar and to all rules on the practice of law, including the Rules of Professional Conduct, Rule 407, SCACR, and the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. The attorney shall not, however, need to comply with the requirements of Rule 403, SCACR. The attorney shall pay the fee specified by Rule 410, SCACR, and shall be subject to suspension under Rule 419, SCACR, for failing to pay those license fees or for failing to comply with continuing legal education requirements.

(g) Unauthorized Practice. If an attorney granted a limited certificate engages in the practice of law in excess of that permitted by this rule, the attorney may be subject to discipline under Rule 413, SCACR, a revocation of the limited certificate by the Supreme Court, or being held in contempt of the Supreme Court for engaging in the unauthorized practice of law.

(h) Misconduct and Incapacity. Except as otherwise provided in this rule, the procedures provided by Rule 413, SCACR, shall be used for resolving allegations that the attorney has committed ethical misconduct or suffers from a physical or mental condition which adversely affects the attorney's ability to practice law. If, however, the Supreme Court imposes a definite suspension or disbarment, or transfers the attorney to incapacity inactive status, the limited certificate shall be terminated as provided in (i) below. Unless otherwise ordered by the Court, the attorney may not seek to be readmitted as an attorney under this rule or any other rule until the period of suspension has expired or, in the case of disbarment, until five years after the date of the opinion or order imposing the disbarment.

(i) Termination of Certificate. The limited certificate of admission to practice law shall terminate if:

(1) The limited certificate is revoked by the Supreme Court under (g) above.

(2) The attorney is admitted to practice law in South Carolina under Rule 402, SCACR, or is granted another limited certificate of admission to practice law under this or any other rule, or is licensed as a foreign legal consultant under Rule 424, SCACR.

(3) The attorney is suspended or disbarred in this or any other jurisdiction. This does not include interim suspensions under Rule 17 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, or a similar rule in another jurisdiction. For an administrative suspension under Rule 419, SCACR, the attorney may seek reinstatement as provided in that rule.

(4) The attorney fails at any time to be a member of the bar in good standing before the highest court of at least one other state or the District of Columbia.

(5) the attorney ceases to meet the requirements of (b)(1)-(3) above.

(j) Resignation. Any request by an attorney licensed under this rule shall be processed as provided by Rule 409, SCACR.

(k) Surrender of Certificate. Upon the termination of the limited certificate of admission to practice law or the acceptance of a resignation, the attorney shall immediately surrender the certificate to the Clerk of the Supreme Court. The failure to immediately surrender the certificate upon termination or the acceptance of a resignation may subject the attorney to discipline under Rule 413, SCACR, or to being held in contempt of the Supreme Court.

RULE 415
LIMITED CERTIFICATE OF ADMISSION FOR THE RETIRED AND INACTIVE ATTORNEY PRO BONO PARTICIPATION PROGRAM

(a) Qualifications for Admission. The Supreme Court may issue a limited certificate of admission to practice law in South Carolina to any person who:

(1) is or was admitted to practice law in another state or territory of the United States or the District of Columbia and is retired from the active practice of law or is on inactive status;

(2) has been a member in good standing in each jurisdiction in which the retired or inactive attorney is or was admitted to practice law;

(3) has not been disciplined for professional misconduct in any jurisdiction within the past fifteen (15) years and is not the subject of any pending disciplinary proceeding;

(4) is associated with an approved legal services organization (Legal Services) which receives, or is eligible to receive, funds from the Legal Services Corporation; is working on a case or project through the South Carolina Bar Pro Bono Program (the Program); or is working with a program funded in whole or in part by a grant from the South Carolina Bar Foundation, Inc. (the Grantee), using interest and dividends remitted under the procedure established in Rule 412, SCACR;

(5) performs all activities authorized by this Rule under the supervision of an attorney who is a regular member of the South Carolina Bar employed by, or participating as a volunteer for, Legal Services, the Program or the Grantee and who assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the retired or inactive attorney participates and;

(6) agrees to abide by the South Carolina Rules of Professional Conduct and all other rules governing the practice of law in this State and to submit to the jurisdiction of the Supreme Court for disciplinary

purposes. No license fee or assessment shall be charged to these attorneys under Rules 410 and 411, SCACR.

(b) Application. An attorney desiring a limited certificate shall file with the Clerk of the Supreme Court an application in duplicate on a form prescribed by the Supreme Court accompanied by:

(1) a certification by Legal Services, the Program or the Grantee stating that:

(A) the retired or inactive attorney is currently associated with Legal Services, the Program or the Grantee;

(B) a regular member of the South Carolina Bar employed by, or acting as a volunteer for, Legal Services, the Program or the Grantee will assume the duties of the supervising attorney required by this Rule; and

(C) the retired or inactive attorney meets the requirements of section (a) of this Rule;

(2) a certificate of good standing from each jurisdiction in which the retired or inactive attorney is or was admitted to practice law; and

(3) a sworn statement by the retired or inactive attorney that the retired or inactive attorney:

(A) has read and is familiar with the South Carolina Rules of Professional Conduct and all rules relating to the practice of law in this State and will abide by the provisions thereof; and

(B) will neither ask for nor receive compensation of any kind for the legal services rendered under this Rule.

(c) Reference to the Committee on Character and Fitness. Any questions concerning the fitness or qualifications of the retired or inactive attorney may be referred by the Supreme Court to the Committee on Character and Fitness for a hearing and recommendation.

(d) Confidentiality. The confidentiality provisions of Rule 402(n), SCACR, shall apply to all files and records of the Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to a limited certificate to practice law under this rule.

(e) Scope of Practice. The limited certificate issued under this Rule authorizes the retired or inactive attorney to provide legal services solely to clients approved to receive services from Legal Services, the Program or the Grantee, or to provide other services through the Program such as Ask-A-Lawyer or educational clinics. The retired or inactive attorney issued a limited certificate may:

(1) appear in any court or before any tribunal in this State if the client consents, in writing, to that appearance and the supervising attorney has given written approval for the appearance. The written consent and approval must be filed with the court or tribunal and must be brought to the attention of the judge or presiding officer prior to the appearance;

(2) prepare pleadings and other documents to be filed in any court or before any tribunal in this State on behalf of the client. Such pleadings shall also be signed by the supervising attorney; and

(3) otherwise engage in the practice of law as is necessary for the representation of the client.

(f) Unauthorized Practice. If an attorney granted a limited certificate engages in the practice of law in excess of that permitted by this rule, the attorney may be subject to discipline under Rule 413, SCACR, a revocation of the limited certificate by the Supreme Court, or being held in contempt of the Supreme Court for engaging in the unauthorized practice of law.

(g) Misconduct and Incapacity. Except as otherwise provided in this rule, the procedures provided by Rule 413, SCACR, shall be used for resolving allegations that the attorney has committed ethical misconduct or suffers from a physical or mental condition which adversely affects the attorney's ability to practice law. If, however, the Supreme Court imposes a

definite suspension or disbarment, or transfers the attorney to incapacity inactive status, the limited certificate shall be terminated as provided in (i) below. Unless otherwise ordered by the Court, the attorney may not seek to be readmitted as an attorney under this rule or any other rule until the period of suspension has expired or, in the case of disbarment, until five years after the date of the opinion or order imposing the disbarment.

(h) Termination of Certificate. The limited certificate of admission to practice law shall terminate if:

(1) a determination by the Supreme Court, in its discretion, that the limited certificate should be revoked. Notice of the revocation shall be sent to the attorney granted the limited certificate and Legal Services, the Program or the Grantee within five (5) days of the revocation. This includes a revocation for the grounds specified in (f) and (g) above.

(2) the attorney is admitted to practice law in South Carolina under Rule 402, SCACR, or is granted another limited certificate of admission to practice law under this or any other rule, or is licensed as a foreign legal consultant under Rule 424, SCACR.

(3) the attorney is suspended or disbarred in this or any other jurisdiction. This does not include interim suspensions under Rule 17 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, or a similar rule in another jurisdiction. For an administrative suspension under Rule 419, SCACR, the attorney may seek reinstatement as provided in that rule.

(4) notice by Legal Services, the Program or the Grantee stating that the attorney granted the limited certificate has ceased to be associated with Legal Services, the Program or the Grantee. Such notice must be sent to the attorney granted the limited certificate and must be filed with the Clerk of the Supreme Court within five (5) days after the association has ceased. The notice need not state a reason for the cessation of the association.

(i) Resignation. Any request by an attorney licensed under this rule shall be processed as provided by Rule 409, SCACR.

(j) Surrender of Certificate and Notice to Courts and Tribunals. Upon the termination of the limited certificate or acceptance of a resignation, the attorney granted the limited certificate shall immediately surrender the certificate to the Clerk of the Supreme Court. The failure to immediately surrender the certificate upon termination or the acceptance of a resignation may subject the attorney to discipline under Rule 413, SCACR, or to being held in contempt of the Supreme Court. Additionally, the supervising attorney shall immediately file notice of the expiration in the official file of each matter pending before any court or tribunal in which the attorney granted the limited certificate was involved.

RULE 419
ADMINISTRATIVE SUSPENSIONS AND TERMINATIONS

(a) Applicability. This rule governs suspensions and terminations for failing to pay the license fees required by Rule 410, SCACR, or to comply with the continuing legal education requirements of Rule 408, SCACR, and the regulations implementing that rule. This rule is applicable to persons licensed to practice law under Rules 402, 405, 414, and 415, and to persons licensed as a foreign legal consultant under Rule 424, SCACR.

(b) Due Date of Fees and Reports.

(1) Annual license fees required by Rule 410, SCACR, shall be due not later than January 1.

(2) Reports of compliance with continuing legal education requirements required by Rule 408, SCACR, and the regulations of the Commission on Continuing Legal Education and Specialization (Commission), including the required fee, shall be due not later than March 1. The reporting period for lawyers, judges and foreign legal consultants shall run from March 1 through the last day in February, annually.

(c) Failure to Comply.

(1) Promptly after January 15, the Bar shall notify persons who have failed to pay the annual license fees and assessments, including payment of any penalty, will be suspended if they do not pay those fees by February 15.

(2) Promptly after March 15, the Commission shall notify persons who have failed to file a report of compliance and pay the annual filing fee, including payment of any penalty established by the Commission, that they will be suspended if they do not file the report of compliance and pay the filing fee and any penalty by April 15.

(d) Suspension by Supreme Court.

(1) Promptly after February 15, the Bar shall forward a list of the persons who have not paid their license fees and penalties to the Clerk of the South Carolina Supreme Court. Those persons shall be suspended by order of the South Carolina Supreme Court and shall thereafter forward their certificate of admission or license to the Clerk of the South Carolina Supreme Court.

(2) Promptly after April 15, the Commission shall forward a list of the lawyers who have not filed reports of compliance with continuing legal education requirements and any required fee and penalty to the Clerk of the South Carolina Supreme Court. Those lawyers shall be suspended by order of the South Carolina Supreme Court and shall thereafter forward their certificate of admission or license to the Clerk of the South Carolina Supreme Court.

(e) Reinstatement by Supreme Court. Any person seeking reinstatement for a suspension under this rule must petition the South Carolina Supreme Court. The petition for reinstatement must show that the person has paid all license fees and penalties due to the South Carolina Bar and is current on all continuing legal education requirements with the Commission, including any fees and penalties. The petition shall be accompanied by a filing fee of $200, and a proof of service showing that a copy of the petition has been served on the Office of Disciplinary Counsel. The Court may take such action as it deems appropriate in acting on the petition for reinstatement, including, but not limited to, requiring the person to appear before the Court for a hearing, referring the petition to the Committee on Character and Fitness or referring the petition to the Commission on Lawyer Conduct for investigation and a recommendation as to the propriety of reinstatement.

For a person holding a limited certificate or licensed as a foreign legal consultant, any petition for reinstatement must be filed within ninety (90) days of the date of the suspension. Otherwise, the expiration of the license based on the suspension under Rules 405, 414, 415 or 424 shall be final.

(f) Termination of Persons Admitted Under Rule 402, SCACR. If a person admitted under Rule 402, SCACR, fails to seek reinstatement within three (3) years of being suspended by the Court under this rule, that person's membership in the South Carolina Bar shall be terminated. The person must thereafter comply with Rule 402, SCACR, to be readmitted to the practice of law in this state; provided, however, that the Supreme Court may waive some or all of the requirements of Rule 402 upon a showing of special circumstances.

RULE 424
LICENSING OF FOREIGN LEGAL CONSULTANTS

(a) Qualifications for Licensure. In its discretion, the Supreme Court of the State of South Carolina may license to practice in this State as a foreign legal consultant, without examination, an applicant who:

(1) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(2) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;

(3) possesses the good moral character and general fitness requisite for a member of the Bar of this State;

(4) is at least twenty-six years of age; and

(5) intends to practice as a foreign legal consultant in this State and to maintain an office in this State for that purpose.

(b) Application. An applicant under this Rule shall file an application in triplicate with the Clerk of the Supreme Court. The application shall be accompanied by a non-refundable application fee of $1,000. The application shall include the following:

(1) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;

(2) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

(3) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English; and

(4) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section (a) of this Rule as the Supreme Court of the State of South Carolina may require.

(c) Confidentiality. The files and records maintained by the Clerk relating to the licensing of foreign legal consultants shall be confidential and shall not be disclosed except as necessary by the Clerk to carry out his or her own responsibilities. The Clerk may disclose information to the National Conference of Bar Examiners and to the bar admission authorities in other jurisdictions, and may disclose the names of those persons who are licensed as foreign legal consultants and date of their licensing. The Supreme Court may authorize the release of confidential information to other persons or agencies.

(d) Scope of Practice. A person licensed to practice as a foreign legal consultant under this Rule may render legal services in this State subject, however, to the limitations that he or she shall not:

(1) appear for a person other than himself or herself as attorney in any court, or before any magistrate, administrative body, or other judicial officer, in this State;

(2) prepare any deed, mortgage, assignment, lease, or any other instrument effecting the transfer or registration of title to real estate located in the United States of America;

(3) prepare:

(A) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or

(B) any instrument relating to the administration of a decedent's estate in the United States of America;

(4) prepare any instrument in respect to the marital or parental relations, rights, or duties of a resident of the United States of America, or the custody or care of the children of such a resident;

(5) render professional legal advice on the laws of this State, the laws of any other state, the laws of the District of Columbia, the laws of the United States of America or of any territory or possession thereof, or the laws of any foreign country other than the country in which the foreign legal consultant is admitted to practice as an attorney or the equivalent thereof;

(6) be, or in any way hold himself or herself out as, a member of the Bar of this State; or

(7) carry on his or her practice under, or utilize in connection with such practice, any name, title, or designation other than one or more of the following:

(A) his or her own name;

(B) the name of the law firm with which he or she is affiliated;

(C) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and

(D) the title "foreign legal consultant," which shall be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]" and also stating "Not a member of the South Carolina Bar."

(e) Rights and Obligations. Subject to the limitations set forth in Section (d) of this Rule, a person licensed as a foreign legal consultant under this Rule shall be considered a lawyer affiliated with the Bar of this State and shall be entitled and subject to:

(1) the rights and obligations set forth in the Rules of Professional Conduct of Rule 407, South Carolina Appellate Court Rules. With respect to continuing legal education requirements of Rule 408(a), a person licensed as a foreign legal consultant shall annually attend at least two (2) hours of approved Continuing Legal Education (CLE) courses devoted to legal ethics/professional conduct; and

(2) the rights and obligations of a member of the Bar of this State with respect to:

(A) affiliation in the same law firm with one or more members of the Bar of this State, including by:

(i) employing one or more members of the Bar of this State;

(ii) being employed by one or more members of the Bar of this State or by any partnership (or professional corporation) which includes members of the Bar of this State or which maintains an office in this State; and

(iii) being a partner in any partnership (or shareholder in any professional corporation) which includes members of the Bar of this State or which maintains an office in this State; and

(B) attorney-client privilege, work-product privilege, and similar professional privileges.

(f) Disciplinary Provisions. A person licensed to practice as a foreign legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the Bar of this State and to this end:

(1) every person licensed to practice as a foreign legal consultant under these Rules:

(A) shall be subject to control by the Supreme Court and to admonition, reprimand, or suspension of his or her license to practice by the Supreme Court of the State of South Carolina and shall otherwise be governed by Rule 407, South Carolina Appellate Court Rules; and

(B) shall execute and file with the Clerk of the Supreme Court, in such form and manner as such court may prescribe:

(i) his or her commitment to observe the Rules of Professional Conduct Rule 407, South Carolina Appellate Court Rules, to the extent applicable to the legal services authorized under Section (c) of this Rule;

(ii) a written undertaking to notify the Supreme Court of any change in such person's good standing as a member of the foreign legal profession referred to in Section (a)(1) of this Rule and of any final action of the professional body or public authority referred to in (b)(1) of this Rule imposing any disciplinary censure, suspension, or any other sanction upon such person; and

(iii) a duly acknowledged instrument, in writing, designating the Clerk of the Supreme Court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and

arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State whenever, after due diligence, service cannot be made upon him at the South Carolina address listed for him or her in the Attorney Information System (AIS). The written acknowledgment shall also contain a statement that the foreign legal consultant will maintain an address in South Carolina, and that her or she will update and verify that address in the AIS as required by Rule 410, SCACR.

(2) Service of process on the Clerk of the Supreme Court, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such Clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of $10. Service of process shall be complete when such Clerk has been so served. Such Clerk shall promptly send one of such copies to the foreign legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such foreign legal consultant at the address listed for that foreign legal consultant in the AIS.

(g) License Fees and Duty to Update and Verify the Attorney Information System (AIS). A person licensed as a foreign legal consultant shall pay the license fees specified in Rule 410, SCACR. Further, foreign legal consultants must update and verify their information on AIS as required by Rule 410, SCACR.

(h) Revocation of License. In the event the Supreme Court of the State of South Carolina determines that a person licensed as a foreign legal consultant under this Rule no longer meets the requirements for licensure set forth in Section (a)(1) or Section (a)(3) of this Rule, it shall revoke the license granted to such person hereunder.

(i) Termination of License. The license as a foreign legal consultant shall terminate if:

(1) The license is revoked by the Supreme Court under (h) above.

(2) The foreign legal consultant is suspended under Rule 419, SCACR. The foreign legal consultant may seek reinstatement as provided in Rule 419.

(3) The foreign legal consultant is admitted to practice law in South Carolina under Rule 402, 405, 414, or 415, SCACR.

(j) Resignation. Any request by an attorney licensed under this rule shall be processed as provided by Rule 409, SCACR.

(k) Surrender of License. Upon the termination of the license or the acceptance of a resignation of the foreign legal consultant, the foreign legal consultant shall immediately surrender the license to the Clerk of the Supreme Court. The failure to immediately surrender the license upon termination or the acceptance of a resignation may subject the foreign legal consultant to discipline under (f) above, or to being held in contempt of the Supreme Court.

(l) Application for Waiver of Provisions. The Supreme Court of the State of South Carolina, upon application, may in its discretion vary the application or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age, and residence address, together with the facts relied upon and a prayer for relief. Such application shall be accompanied by a filing fee of $75.00.

The Supreme Court of South Carolina

In the Matter of Spartanburg
County Magistrate Keith Allen
Sherlin, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension. Spartanburg County is under no obligation to pay respondent his salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991). Respondent is directed to immediately deliver all books, public records, bank account records, funds, property, and documents relating to his judicial office to the Chief Magistrate of Spartanburg County. Respondent is enjoined from access to any monies, bank accounts, and records related to his judicial office.

IT IS FURTHER ORDERED that respondent is prohibited from entering the premises of the magistrate court unless escorted by a law enforcement officer after authorization from the Chief Magistrate of Spartanburg County. Finally, respondent is prohibited from having access to, destroying, or canceling any public records and he is prohibited from access to any judicial databases or case management systems. This order authorizes the appropriate government or law enforcement official to implement any of the prohibitions as stated in this order.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from having access to or making withdrawals from the accounts.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

May 7, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

George Way, Appellant,

v.

Mary Way, Respondent.

Appeal From Clarendon County
W. Jeffrey Young, Family Court Judge

Opinion No. 4968
Heard March 12, 2012 – Filed May 9, 2012

AFFIRMED AS MODIFIED

William Ceth Land, of Manning, for Appellant.

Stephen L. Hudson, of Columbia, for Respondent.

PER CURIAM: George Way (Husband) appeals the family court's order granting him a divorce from Mary Way (Wife), arguing the family court erred in ordering him to pay Wife $20,000 as part of the equitable

division of marital property and $500 per month in alimony. We affirm as modified.

FACTS

Husband and Wife married in 1978 and separated in 2005 when Husband moved out. The parties had no children but incurred a great deal of debt. Complaining of Wife's spending habits, in July 2005, Husband filed an action for separate support and maintenance, which he later amended to request a divorce on the ground of one year's continuous separation. In response to Husband's petition for temporary relief, the family court entered an order preserving the status quo, with Wife retaining temporary possession of the marital home and Husband continuing to pay the mortgage, taxes, and insurance on it.

On August 14, 2007, the family court heard arguments. Both parties filed updated financial declarations showing monthly deficits. The primary issues were the division of debt, disposition of the parties' real property, and alimony.

I. Marital Home

With regard to the marital home, the parties testified Husband received a one-acre lot of land from his family, whose land and homes surrounded the lot. For approximately eleven years after marrying, the parties lived in a double-wide mobile home on the lot. After Hurricane Hugo destroyed the mobile home, the parties took out a mortgage loan and built a home in its place. Subsequently, Husband used defective concrete blocks to construct an unpermitted storage building, where he stored tools and equipment.

According to Husband, the county tax assessor valued the marital home and land at $73,100; adding the value of the unpermitted building, Husband valued the property at approximately $75,000. By contrast, Wife believed the home was worth $110,000 and the outbuilding was worth an additional

$30,000. At the time of the hearing, the parties owed $39,146.58 on the first mortgage, payable at a rate of $524.66 per month.

II. Other Debts

In 2001, the parties took out a second mortgage loan in an effort to consolidate their then-existing debts. At the time of the hearing, the parties owed $53,873.85 on the second mortgage loan, payable at a rate of $675.54 per month.

In addition to the first and second mortgage loans, each party owed debts in his or her own name. According to his financial declaration, Husband's non-mortgage debts totaled $14,794.25, for a monthly obligation of $998.07. One of Husband's debts, for $10,794.25 to CitiFinancial, included the cost of purchasing Wife's car. Wife's financial declaration reflected non-mortgage debts totaling $29,118, for a monthly obligation of $907.[1] Husband testified that, until he began receiving telephone calls from bill collectors, he was unaware of Wife's new debts. Wife confirmed that she had had the bills for these accounts sent to her sister's address.

III. Other Assets

Both parties were employed. Husband reported gross monthly earnings averaging between $3,100 and $3,600 from his job as a truck driver. In addition, he received a monthly retirement payment of $401.68 from Campbell's Soup. Wife reported gross monthly earnings of $1,339 from her job as a sewing machine operator. She requested $1,000 per month in permanent alimony.

While Husband had two retirement accounts, Wife had none. Husband testified the payments he received from his Campbell's Soup retirement

[1] Wife did not specify a monthly payment for her Chase Visa account, the balance of which was $14,500. She testified she could not afford to make payments on that account.

account would continue until he reached age 65.[2] In addition, Husband expected to receive approximately $500 per month from his military retirement account, beginning at age 60.

Each party expressed a desire to keep his or her own vehicle: Husband had a 1987 Chevrolet pickup truck, and Wife had a 1999 Toyota Camry.[3] At the conclusion of the hearing, the parties stipulated an old motorcycle stored in the outbuilding was not marital property. The family court adjourned the hearing, noting it would hold open the record for the receipt of the point credit summary relating to Husband's military retirement account and the 2001 appraisal of the marital home.

IV. Order

On April 18, 2008, the family court entered an order granting the parties a divorce, dividing the marital property and debt, and requiring Husband to pay Wife alimony. The family court found Husband's monthly income was $3,201.68, and Wife's was $1,339.00. With respect to marital property, the family court regarded all property as marital because neither party possessed "substantial" non-marital property. The family court assigned a present value of –$8,500 to the marital home.[4] The family court noted Wife had no vested retirement account, but Husband had two. Of Husband's two retirement accounts, the family court determined his military

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[2] At the time Husband filed this action, he was 57 years old and Wife was 48 years old.

[3] The parties stipulated to a value of $1,885 for Husband's truck. Husband considered Wife's car to be in excellent condition and valued it at $5,100. Wife described it as being in good condition and valued the car at $4,590.

[4] This number appears to reflect the family court's determination of the home's market value, minus the amounts owed on the first and second mortgages that encumbered the home. Adding the mortgage balances and reducing the total by $8,500 indicates the family court set the marital home's market value at $84,520.43, which falls within the range established by the parties' valuations of the home.

retirement account was divisible but his account from Campbell's Soup was not. The family court did not specify a value for any other marital property.

The family court also found each party maintained marital debt in his or her own name. Husband's assets and debts, which included the marital home, totaled –$31,051.68. Wife's assets and debts totaled –$20,488.00. With regard to the 2001 second mortgage loan of $57,400, the family court found $42,770 of the proceeds from that loan paid Husband's debts[5] and $9,182 paid Wife's debts.

Based upon these facts, the family court awarded Wife her automobile, the personal property already in her possession, any items of personal property remaining in the marital home, and $132 per month of Husband's military retirement account.[6] Husband received the marital home, his pickup truck, any items of personal property remaining in the storage building, his Campbell's Soup retirement account, and the remainder of his military retirement account. The family court held each party individually "responsible for the debts in his or her individual name" and for his or her own attorney's fees and costs.

The family court required Husband to pay Wife a lump sum of $20,000 because he "received Thirty-Three Thousand Five Hundred Eighty-Eight and 00/100 ($33,588.00) in greater benefit" from the 2001 second mortgage than

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[5] Although Husband expressed concern about Wife's spending habits, his testimony demonstrated he, too, suffered from poor judgment in financial matters. For example, he took out a loan of $12,957 to provide a car for his son from a prior marriage. After the son failed to make payments for the car, Husband repossessed it and resold it at a loss for either $4,000 or $400. Part of the proceeds from the 2001 second mortgage loan paid off the car loan.

[6] In the absence of actuarial evidence, the family court determined Wife's distribution from each payment rather than setting a present value for the divisible account. See Smith v. Smith, 308 S.C. 372, 375, 418 S.E.2d 314, 316 (Ct. App. 1991) (recognizing "two common methods of valuing pensions . . . : (1) present cash value, and (2) distribution from each payment").

Wife. Furthermore, in view of Husband's receipt of the marital home and his undivided Campbell's Soup retirement account, the family court ordered him to pay Wife $500 per month in permanent periodic alimony.

Husband filed a motion for reconsideration, contending the evidence did not support the family court's allocation of proceeds from the 2001 second mortgage loan, award to Wife of a $20,000 lump sum, and award to Wife of $500 per month in alimony. The family court denied Husband's motion. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations." Lewis v. Lewis, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). The burden is upon the appellant to convince the appellate court that the preponderance of the evidence is against the family court's findings. Id. "Stated differently, de novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court." Id. at 388-89, 709 S.E.2d at 654.

LAW/ANALYSIS

I. Equitable Division

Husband argues the family court failed to follow the proper steps for equitable distribution and erred in ordering him to pay Wife $20,000 toward equitable division. We agree[7] and modify the family court's order to strike the $20,000 lump sum.

[7] Wife did not appeal the division of the marital estate. At oral argument, Husband conceded he was satisfied with the overall division and, with regard to the issue of equitable division, sought only to have the $20,000 lump sum stricken. Therefore, we address the family court's equitable division of the

This court recently held:

> The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership. The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership.
>
> . . . For purposes of equitable distribution, "marital debt" is debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt or whether one party is legally individually liable. The same rules of fairness and equity that apply to the equitable distribution of marital property also apply to the equitable division of marital debts.

King v. King, 384 S.C. 134, 143, 681 S.E.2d 609, 614 (Ct. App. 2009) (internal citations and quotation marks omitted).

In the case at bar, the family court was tasked with equitably dividing an estate comprised primarily of unpaid debt. The marital home, which is often the most valuable asset in a longterm marriage, was so encumbered by mortgages that it had a negative value. The record reflects that the most substantial positively valued assets in the marital estate were the parties' vehicles: Husband's truck, valued at $1,885, and Wife's car, valued at either

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marital estate only to the extent the lump sum affects the fairness of the overall award. See Barrow v. Barrow, 394 S.C. 603, 610 n.3, 716 S.E.2d 302, 306 n.3 (Ct. App. 2011) (excluding matters conceded at oral argument from discussion of issue on appeal).

$4,590 or $5,100.[8] Nonetheless, even Wife's car was hardly owned outright: the parties purchased it using funds from a loan the family court ordered Husband to repay in full. As a result, we find that, following the equitable distribution of the marital estate, Husband lacked the means to pay a $20,000 lump sum.

In addition, the family court carefully parsed and divided between the parties the proceeds from the 2001 second mortgage loan. Though its reasoning is unclear from the record, the family court appears to have based its award of a $20,000 lump sum to Wife on the benefits the parties purportedly received from the proceeds of this loan. For the purposes of this appeal and in view of Husband's concession at oral argument, we set aside our concerns about dividing up as non-marital property the proceeds of a seven-year-old mortgage loan that was secured by, and was used at least in part to improve, the marital home. Regardless of who received which benefits or whether the benefits conferred were personal or marital, Husband is obligated to repay the full amount of the 2001 second mortgage loan.

We find it sufficient to note that, to the extent the proceeds at issue represented a marital asset, by the time the family court ruled, it was a phantom asset. The outstanding balance of the loan exceeded the parties' equity in the property used to secure it. Accordingly, Husband could not have satisfied the 2001 second mortgage loan even by liquidating the property. Under the particular circumstances present in this case, we find it inequitable to burden him with an additional payment to Wife of $20,000.

After a thorough review of the record on appeal and the family court's order, we are unable to find any evidence supporting the award of a $20,000 lump sum to Wife. Furthermore, no evidence indicates Husband either possessed or received through equitable distribution any assets that would

[8] The family court awarded the personal property from the home to Wife and from the storage building to Husband but made no findings as to the value of either award. Only Husband listed the aggregate value of the parties' personal property on his financial declaration. He valued it at $3,000.

enable him to amass $20,000. Accordingly, we affirm the family court's division of marital property but modify its order to strike the lump sum.

II. Alimony

Husband argues the family court erred in ordering him to pay Wife $500 per month in permanent periodic alimony. We disagree.

Alimony functions as a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage. Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). After finding an award of alimony is warranted, the family court must ensure its award is "fit, equitable, and just." Id. The family court "may grant alimony in such amounts and for such term as [it] considers appropriate under the circumstances." Davis v. Davis, 372 S.C. 64, 79, 641 S.E.2d 446, 454 (Ct. App. 2006). A family court considering an award of alimony:

> [M]ust consider and give weight in such proportion as it finds appropriate to all of the following factors:
>
> (1) the duration of the marriage[,] together with the ages of the parties at the time of the marriage and at the time of the divorce or separate maintenance action between the parties;
>
> (2) the physical and emotional condition of each spouse;
>
> (3) the educational background of each spouse, together with need of each spouse for additional training or education in order to achieve that spouse's income potential;

> (4) the employment history and earning potential of each spouse;
>
> (5) the standard of living established during the marriage;
>
> (6) the current and reasonably anticipated earnings of both spouses;
>
> (7) the current and reasonably anticipated expenses and needs of both spouses;
>
> (8) the marital and nonmarital properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action;
>
> (9) custody of the children . . . ;
>
> (10) marital misconduct or fault of either or both parties . . . ;
>
> (11) the tax consequences to each party as a result of the particular form of support awarded;
>
> (12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and
>
> (13) such other factors the court considers relevant.

S.C. Code Ann. § 20-3-130(C) (Supp. 2011).

We affirm the award of alimony. The family court considered and adequately addressed each of the statutory factors in making its award, and

the preponderance of the evidence supports its decision. Although section 20-3-130(C) requires the family court to consider and give appropriate weight to each of the thirteen factors, it does not require a full explanation of the weight accorded to each factor. Nonetheless, the family court made clear which factors carried the greatest weight in this case.

The family court recited all thirteen statutory factors and made at least one finding of fact concerning each factor. In particular, the family court recognized although Wife would need additional training to achieve a greater income, she had "most likely reached her income potential." The family court also noted Wife's historical dependence on Husband's income for her standard of living. In addition, the family court stated it considered Husband's greater income, which was augmented by his undivided Campbell's Soup retirement account. We find the standard of living established during this lengthy marriage, the disparity in the parties' incomes and earning abilities, and Wife's dependence upon Husband's income support an award of alimony.

Moreover, the preponderance of the evidence supports the amount of alimony awarded. See Allen, 347 S.C. at 184, 554 S.E.2d at 424 (requiring an award of alimony to be "fit, equitable, and just"). The family court recorded Husband's "current income total[ed]" $3,201.68 per month. Although the family court did not indicate whether this amount included the monthly disbursement of $401.68 from Husband's retirement account, we note the family court specifically identified the retirement income as a factor in its alimony analysis.[9] The family court further recorded Wife's current income was $1,339.00 per month. An award of $500 per month in alimony to Wife effectively reduced Husband's gross income to $2,701.68 per month and raised Wife's to $1,839 per month.

[9] According to his financial declaration and testimony, Husband earned an average of $3,100 to $3,600 per month as a truck driver. Nonetheless, the family court found Husband's total monthly income was $3,201.68. If this total includes the $401.68 retirement benefit, Husband earned only $2,800. However, neither party contests this finding.

The family court's award leaves both parties suffering from similar monthly deficits. Husband identified monthly expenses of $3,340.59, including $100 for room rent while living with his parents and $1,200.20 for payments on the first and second mortgages. As a result, he has a monthly deficit of $638.91 before taxes, which is reducible to a deficit of $538.91 upon his return to the marital home. If Husband's future earnings exceed $2,800 per month, he could further reduce his deficit. Wife identified monthly expenses of $2,668.84, including $1,240.84 for housing based upon the first and second mortgage payments on the marital home. The record does not reflect how much Wife might pay for other housing. Using these numbers, Wife has a monthly deficit of $829.84 before taxes. However, she could reduce that deficit by minimizing the amount she spends on housing.

The alimony award leaves Husband with a greater gross monthly income than Wife. However, after paying the monthly bills reflected in the parties' financial declarations, both parties experience similar deficits. Neither experiences a windfall. Accordingly, the award is equitable, and the preponderance of the evidence supports the family court's decision.

CONCLUSION

We find the evidence in the record does not support the family court's award to Wife of a $20,000 lump sum. Therefore, we affirm the family court's distribution of the marital estate but strike the $20,000 lump sum.

In addition, we find the preponderance of the evidence supports the family court's award of permanent periodic alimony to Wife. Accordingly, we affirm that decision.

AFFIRMED AS MODIFIED.

FEW, C.J., HUFF, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Matthew Campbell, Appellant/Respondent,

v.

Ashley Robinson, Respondent/Appellant.

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4969
Heard October 5, 2012 – Filed May 9, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

David Alexander, of Greenville, for Appellant/Respondent.

Kenneth C. Porter, of Greenville, for Respondent/Appellant.

THOMAS, J.: These cross appeals arise out of a broken engagement between Matthew Campbell and Ashley Robinson. Campbell appeals the trial court's (1) denial of his motions for directed verdict and judgment notwithstanding the verdict (JNOV) and (2) overruling of his objections to the jury charge and verdict form. Robinson appeals the trial court's denial of her post-trial motions. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Campbell proposed and presented a ring to Robinson in December 2005. In a spring 2006 phone conversation, they agreed to postpone the wedding. The engagement was later cancelled, and a dispute ensued over ownership of the ring.

Campbell filed suit against Robinson, demanding a jury trial and seeking (1) declaratory judgment that he owned the ring and was entitled to the ring's return or equivalent value; (2) claim and delivery of the ring, plus damages for the ring's wrongful retention; and (3) restitution for the benefit Robinson received while possessing the ring. Robinson answered and raised a counterclaim for breach of promise to marry, arguing she was entitled to damages for her prenuptial expenditures, mental anguish, and injury to health.

At trial, Robinson testified the engagement ended simply because Campbell cancelled it. She also testified that after the engagement was cancelled, she asked Campbell twice whether she should return the ring. She maintained that Campbell, in response to her inquiries, said she should keep the ring. Campbell testified that he gave Robinson the ring believing they would get married. He denied ending the engagement by himself and contended the cancellation was mutual. He also denied telling Robinson that

she should keep the ring. He contended Robinson refused to give him the ring after he asked for its return.[1]

Campbell moved for directed verdict on Robinson's action for breach of promise to marry, arguing South Carolina no longer recognizes the claim. He also moved for directed verdict on his claims, maintaining he was entitled to the ring because the ring was a gift conditioned upon the marriage. Robinson moved for directed verdict on all of the parties' causes of action. The trial court held (1) South Carolina has not abolished actions for breach of promise to marry and (2) South Carolina courts hinge entitlement to the ring upon who was "at fault" in the engagement's cancellation. Consequently, the trial court explained that Campbell would receive the ring if Robinson was at fault in terminating the engagement. If Campbell was at fault, Robinson would keep the ring, and if Campbell breached the promise to marry, Robinson could recover damages. The trial court rejected Campbell's argument that he could recover damages on his claims.

The trial court charged the jury consistent with the above explanation and provided a verdict form asking the jury to determine which "party was responsible for the termination of the contract to marry." The court then overruled Campbell's jury charge and verdict form objections, which were based upon the same grounds he raised at the directed verdict stage. The jury found that Campbell was responsible for the termination of the engagement but also found that Robinson was not entitled to any damages. Campbell moved for JNOV or a new trial absolute. Robinson moved for JNOV and "a new trial on the sole issue of damages," arguing the jury rendered an inconsistent verdict. The trial court denied the motions, and this appeal followed.

[1] Neither party contends that the ring was a family heirloom or that they shared its cost.

ISSUES ON APPEAL

1. Did the trial court err in denying Campbell's motion for directed verdict on Robinson's breach of promise to marry action?

2. Did the trial court err in denying Campbell's motions for directed verdict and JNOV on his claims?

3. Did the trial court err in overruling Campbell's objections to the jury charge and verdict form?

4. Did the trial court err in denying Robinson's post-trial motions for her breach of promise to marry action?

CAMPBELL'S APPEAL

I. The Action for Breach of Promise to Marry

Campbell argues the trial court erred in denying his motion for directed verdict on Robinson's breach of promise to marry action because South Carolina courts no longer recognize the claim. He acknowledges our supreme court in Bradley v. Somers, 283 S.C. 365, 322 S.E.2d 665 (1984), explicitly refused to eliminate promise to marry claims. Id. at 368-69, 322 S.E.2d at 667. However, he maintains Russo v. Sutton, 310 S.C. 200, 422 S.E.2d 750 (1992), effectively overruled Bradley because it established a policy disfavoring "heart balm" actions. We disagree.

Certain heart balm actions similar to breach of promise to marry claims have been abolished. See Russo, 310 S.C. at 204-05, 205 n.5, 422 S.E.2d at 753, 753 n.5 (abolishing the heart balm action for alienation of affection and recognizing our legislature abolished the heart balm action for criminal conversation); Heape v. Heape, 335 S.C. 420, 424, 517 S.E.2d 1, 3 (Ct. App. 1999) (noting Russo's holding as to alienation of affection and the legislature's action as to criminal conversation). However, promise to marry

actions have not been expressly abolished, and we may not overrule supreme court precedent such as Bradley. See S.C. Const. art. V § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Consequently, we affirm the denial of Campbell's directed verdict motion.

II. Directed Verdict and JNOV

Campbell contends the trial court erred in denying his motions for directed verdict and JNOV because the trial court hinged ownership of the ring upon who was at fault in the engagement's cancellation. We agree that fault does not determine ownership of the ring but affirm the denial of Campbell's motions.[2]

"When reviewing the denial of a motion for directed verdict or JNOV," we must "view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party." Pridgen v. Ward, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Ct. App. 2010) (internal quotation marks omitted). We will reverse the trial court's ruling only "when there is no evidence to support the ruling or when the ruling is controlled by an error of law." Id. (internal quotation marks omitted).

[2] Robinson argues the trial court properly denied Campbell's motions for directed verdict and JNOV because the action for breach of promise to marry determines entitlement to the ring. We disagree. The actionable conduct underlying breach of promise to marry claims is the act of breaking the promise to marry; it does not include the conduct that leads to the breakup. See Coggins v. Cannon, 112 S.C. 225, 229, 99 S.E. 823, 824 (1919) ("[T]he issues were: (1) Did the defendant make the promise to marry . . . ? (2) Did the defendant break that promise? (3) If so, was the plaintiff damaged . . . ?"). Moreover, the claim for breach of promise to marry does not determine which person is entitled to an engagement ring. The claim seeks tort damages to grant economic redress for harm and loss of expectation caused by the rejection. Bradley, 283 S.C. at 367-68, 322 S.E.2d at 666-67.

An engagement ring by its very nature is a symbol of the donor's continuing devotion to the donee. Once an engagement is cancelled, the ring no longer holds that significance. See, e.g., Heiman v. Parrish, 942 P.2d 631, 634 (Kan. 1997); McIntire v. Raukhorst, 585 N.E.2d 456, 457-58 (Ohio Ct. App. 1989); Lindh v. Surman, 742 A.2d 643, 645 (Pa. 1999); Brown v. Thomas, 379 N.W.2d 868, 872 (Wisc. Ct. App. 1985), abrogation on other grounds recognized by Koestler v. Pollard, 471 N.W.2d 7, 9 n.4 (Wis. 1991); 38A C.J.S. Gifts § 41 (2011). Thus, if a party presents evidence a ring was given in contemplation of marriage, the ring is an engagement ring. As an engagement ring, the gift is impliedly conditioned upon the marriage taking place. Until the condition underlying the gift is fulfilled, the attempted gift is unenforceable and must be returned to the donor upon the donor's request. Cf. Watkins v. Hodge, 232 S.C. 245, 249, 101 S.E.2d 657, 658 (1958) ("[T]he only reasonable inference is that there was not a gift . . . . In common parlance, to be legally binding a gift must have no strings attached, such as admittedly existed in this case."); Lynch v. Lynch, 201 S.C. 130, 137, 146, 21 S.E.2d 569, 572, 576 (1942) ("[A] gift to be operative must be executed and must take effect immediately and irrevocably, for the obvious reason that if anything remains to be done the title to the property does not pass . . . . Thus, mere intention to give without delivery is unavailing; the intention must be executed by a complete and unconditional delivery." (internal quotation marks omitted)).

The person challenging the assertions that the ring is an engagement ring and therefore impliedly conditioned upon marriage has the burden of presenting evidence to overcome those assertions. This burden may be satisfied by presenting evidence showing that the ring was not given in contemplation of marriage—it was not an engagement ring—or was not conditioned upon the marriage. If the parties do not dispute that the ring was originally an engagement ring conditioned upon the marriage, the burden may also be satisfied by presenting evidence establishing the ring subsequently became the challenger's property. See, e.g., Hawkins v. Smith,

141 S.E. 917, 917 (Ga. Ct. App. 1928) (recognizing that a conditional gift of an engagement ring could become an absolute gift after the engagement was cancelled).

Jurisdictions differ on whether ownership of an engagement ring may be based upon fault in the breakup. Courts that do consider fault generally reason that it is unfair for a person to retain the fruit of a broken promise.[3] In contrast, courts with a "no-fault" approach often base their decision upon the abolishment of heart balm actions, adoption of no-fault divorce, desire to limit courtroom dramatics, and reduction of the difficulty in determining the issue of what constitutes fault in the decline of a relationship.[4]

We hold that the consideration of fault has no place in determining ownership of an engagement ring. Generally, gift law will dictate who has the legal right to the ring.

In other contexts, the culpability of one's conduct is determined by legal standards such as the reasonable person. See, e.g., Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) ("[N]egligence is the failure to use due care, i.e., that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." (internal quotation marks omitted)). In contrast, no legal standard exists by which a fact finder

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[3] See, e.g., De Cicco v. Barker, 159 N.E.2d 534, 535 (Mass. 1959); Clippard v. Pfefferkorn, 168 S.W.3d 616, 620 (Mo. Ct. App. 2005); Gikas v. Nicholis, 71 A.2d 785, 785-86 (N.H. 1950); Curtis v. Anderson, 106 S.W.3d 251, 256 (Tx. Ct. App. 2003); Spinnell v. Quigley, 785 P.2d 1149, 1151 (Wash. Ct. App. 1990).

[4] See, e.g., Fierro v. Hoel, 465 N.W.2d 669, 672 (Iowa Ct. App. 1990); Heiman, 942 P.2d at 637; Meyer v. Mitnick, 625 N.W.2d 136, 139-40 (Mich. Ct. App. 2001); Aronow v. Silver, 538 A.2d 851, 853-54 (N.J. Super. Ct. Ch. Div. 1987); Vigil v. Haber, 888 P.2d 455, 457 (N.M. 1994); Gaden v. Gaden, 272 N.E.2d 471, 476 (N.Y. 1971); Lyle v. Durham, 473 N.E.2d 1216, 1218-19 (Oh. Ct. App. 1984); Lindh, 742 A.2d at 646; Brown, 379 N.W.2d at 873.

can adjudge culpability or fault in a prenuptial breakup. See, e.g., Heiman, 942 P.2d at 637-38 ("What is fault or the unjustifiable calling off of an engagement? . . . [S]hould courts be asked to determine which of the following grounds for breaking an engagement is fault or justified? (1) The parties have nothing in common; (2) one party cannot stand prospective in-laws; (3) a minor child of one of the parties is hostile to and will not accept the other party; (4) an adult child of one of the parties will not accept the other party; (5) the parties' pets do not get along; (6) a party was too hasty in proposing or accepting the proposal; (7) the engagement was a rebound situation which is now regretted; (8) one party has untidy habits that irritate the other; or (9) the parties have religious differences. The list could be endless."); Aronow, 538 A.2d at 853-54 ("What fact justifies the breaking of an engagement? The absence of a sense of humor? Differing musical tastes? Differing political views? . . . They must be approached with intelligent care and should not happen without a decent assurance of success. When either party lacks that assurance, for whatever reason, the engagement should be broken. No justification is needed. Either party may act. Fault, impossible to fix, does not count.").

South Carolina's use of fault in dividing property within the family court's jurisdiction does not mandate the use of the fault approach for determining ownership of engagement rings when the marriage fails to occur. When the family court apportions property based upon fault, the parties in the dispute have a special statutory right in the subject property. See S.C. Code Ann. § 20-3-610 (Supp. 2011) ("During the marriage a spouse shall acquire . . . a vested special equity and ownership right in the marital property . . . ."); S.C. Code Ann. § 20-3-630(A) (Supp. 2011) (providing that "marital property" is, except for certain enumerated exclusions, "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation"); S.C. Code Ann. § 20-3-630(B) (Supp. 2011) (providing that the family court lacks jurisdiction to apportion nonmarital property); see also S.C. Code Ann. § 20-3-620(B)(2) (Supp. 2011) ("In making apportionment,

the court must give weight in such proportion as it finds appropriate to . . . marital misconduct or fault of either or both parties . . . ."). Outside of property apportionment during a divorce, that statutory right does not exist.

Our legislature has long expressed an interest in protecting the sanctity of marriage. Absent one of the other four explicitly limited grounds for divorce, spouses may divorce only if the couple lives separately without cohabitation for one year. S.C. Const. art. XVII, § 3; S.C. Code Ann. § 20-3-10(1)-(5) (1976). With that recognition in mind, the adoption of the fault approach could cause ironic results. Two of the main purposes of an engagement are to prepare the couple for marriage and test the permanency of their compatibility. In some circumstances, the fault approach may penalize a party who innocently recognizes the couple's incompatibility. See Fierro, 465 N.W.2d at 672 ("This court adopts the no fault approach followed in a minority of jurisdictions. Since the major purpose of the engagement period is to allow a couple time to test the permanency of their feelings, it would seem highly ironic to penalize the donor for taking steps to prevent a possibly unhappy marriage." (citations and internal quotation marks omitted)). On the other hand, adoption of the no-fault approach would not diminish our state's intent to protect the marital relationship.

Lastly, our law addressing heart balm actions does not suggest that we should adopt the fault approach. In fact, our law may provide contradicting suggestions. While breach of promise to marry actions have not been explicitly abolished, the claims for alienation of affections and criminal conversation have. Compare Bradley, 283 S.C. at 368, 322 S.E.2d at 667 ("The appellant urges this court to abolish the cause of action for breach of marriage promise. We decline to do so."), with Russo, 310 S.C. at 204-05, 205 n.5, 422 S.E.2d at 753, 753 n.5 (abolishing the heart balm action for alienation of affections and recognizing our legislature abolished the heart balm action for criminal conversation); Heape, 335 S.C. at 424, 517 S.E.2d at 3 (noting Russo's holding as to alienation of affection and the legislature's action as to criminal conversation).

Although fault cannot determine ownership of the ring, we affirm the denial of Campbell's motions for directed verdict and JNOV on his actions for declaratory judgment and claim and delivery. Here, Campbell gave Robinson the ring during his proposal. Thus, he presented evidence that the ring was given in contemplation of marriage and therefore was an engagement ring conditioned upon the marriage occurring. Although Robinson kept the ring in a safe deposit box after the engagement was cancelled, without further evidence the ring would remain a conditional gift and Campbell would be entitled to recover it as a matter of law.

Robinson explicitly characterizes the ring as an engagement ring. However, she has presented evidence that the ring was converted into an absolute gift by testifying Campbell told her to keep the ring after the engagement was cancelled. Because Campbell disputes this contention, the evidence conflicts as to whether the ring was conditioned upon marriage. See Worrell v. Lathan, 324 S.C. 368, 371, 478 S.E.2d 287, 288 (Ct. App. 1996) (noting that a gift is complete when there is "a donative intent to transfer title to the property, a delivery by the donor, and an acceptance by the donee" (internal quotation marks omitted)); see also Smith v. Johnson, 223 S.C. 64, 67-68, 74 S.E.2d 419, 421 (1953) (holding that "delivery" need not be "manual" but, "so far as the donor can make it so," must only be "some act which indicates a relinquishment of possession and dominion on the part of the donor in behalf of the donee" (citations and internal quotation marks omitted)); Hawkins, 141 S.E. at 917 (recognizing that a conditional gift of an engagement ring can become an absolute gift after the engagement is cancelled). Accordingly, ownership of the ring was a jury issue, and a directed verdict on Campbell's claims for declaratory judgment and claim and delivery were not warranted.

We also affirm the trial court's denial of Campbell's motions for directed verdict and JNOV on his restitution claim. Restitution is an equitable remedy sought to prevent unjust enrichment. Verenes v. Alvanos, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010); Stanley Smith & Sons v. Limestone Coll., 283 S.C. 430, 434 n.1, 322 S.E.2d 474, 478 n.1 (Ct. App. 1984). Thus, "the plaintiff must show: (1) that he conferred a nongratuitous

benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value." Niggel Assocs. v. Polo's of N. Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988). To be conferred nongratuitously, the plaintiff must confer the benefit either "(1) at the defendant's request or (2) in circumstances where the plaintiff reasonably relies on the defendant to pay for the benefit and the defendant understands or ought to understand that the plaintiff expects compensation and looks to him for payment." Id. at 532-33, 374 S.E.2d at 509.

Here, the record does not contain evidence Campbell presented the ring to Robinson at her request. Nor does the record contain evidence Campbell permitted Robinson to keep the ring at her request or that he reasonably relied upon her to pay for the ring. Thus, Campbell was not entitled to a directed verdict or JNOV on his restitution claim.

III. Verdict Form and Jury Charge

Campbell claims the trial court erred in denying his motion for a new trial absolute because the verdict form and jury charge were erroneous. In light of our rulings above, we agree.[5]

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Berberich, 392 S.C. at 285, 709 S.E.2d at 611 (citation and internal quotation marks omitted). "An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party." Id.

Here, the trial court provided an erroneous jury charge and verdict form. The evidence presented a jury issue of whether the ring was a

[5] We acknowledge the trial court lacked appellate court guidance on this issue at the time of trial.

conditional or absolute gift. While the charge instructed the jury that the gift was conditional, it did not explain that the gift could become absolute. Moreover, the jury charge and verdict form hinged ownership of the ring upon fault in the breakup.

The focus on fault in the jury charge and verdict form undoubtedly affected the verdict. Fault was the only question posed to the jury to determine ownership of the ring, and the jury's finding on the question was adverse to Campbell. Thus, his actions for declaratory judgment and claim and delivery were prejudiced by the jury charge and verdict form. He is entitled to a new trial on those claims. In contrast, no evidence shows the ring was conferred to Robinson "nongratuitously." Therefore, Campbell was not prejudiced by the verdict form or jury charge on his restitution action, and he is not entitled to a new trial on that claim.

ROBINSON'S APPEAL

Robinson argues the trial court erred in declining to grant her JNOV to award her damages, a new trial nisi additur, and a new trial as to damages because the jury's verdict was inconsistent.[6] We affirm.

Even if the verdict was inconsistent, Robinson's motions were not appropriate remedies to correct that error. When a jury renders an inconsistent verdict, the only remedies available at that moment are to

[6] We note that Robinson's argument seeking a new trial nisi additur is unpreserved. See Cullen v. McNeal, 390 S.C. 470, 492, 702 S.E.2d 378, 390 (Ct. App. 2010) ("[F]or an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial court."). Moreover, Robinson's appellate brief describes her motion for a new trial as to damages as a "new trial absolute as to damages." However, her post-trial motions sought merely "a new trial on the sole issue of damages . . . ." A new trial absolute and a new trial as to damages are different remedies. Thus, even if her appellate argument sought a new trial absolute, that issue is unpreserved. See id. ("[F]or an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial court.").

resubmit the case to the jury or grant a new trial absolute. See Stevens v. Allen, 342 S.C. 47, 52-53, 536 S.E.2d 663, 665-66 (2000); Camden v. Hilton, 360 S.C. 164, 173-74, 600 S.E.2d 88, 92-93 (Ct. App. 2004). The remedies to correct an inconsistent verdict are limited because a court cannot determine whether the jury intended to render a verdict for the plaintiff or defendant. Stevens v. Allen, 336 S.C. 439, 450-51, 520 S.E.2d 625, 630-31 (Ct. App. 1999).

CONCLUSION

For the aforementioned reasons, we affirm the issues as they relate to Campbell's action for restitution and Robinson's action for breach of promise to marry. We reverse and remand for a new trial on Campbell's actions for declaratory judgment and claim and delivery.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolina Convenience Stores, Inc., Harry Lancaster, Jr., as Power of Attorney for Harry Lancaster, Sr., and Oil Company, Inc., Appellants,

v.

City of Spartanburg, SC, Respondent.

Appeal From Spartanburg County
E. C. Burnett, III, Acting Circuit Court Judge

Opinion No. 4970
Heard February 14, 2012 – Filed May 9, 2012

AFFIRMED

Charles J. Hodge and Timothy Ryan Langley, of Spartanburg, for Appellants.

David Leon Morrison, of Columbia, for Respondent.

WILLIAMS, J.: Carolina Convenience Stores, Inc., Harry Lancaster, Jr., and Willard Oil Company, Inc. (collectively, CCS) appeal the circuit court's grant of summary judgment in favor of the City of Spartanburg (the City) on CCS's inverse condemnation claim against the City. We affirm.

FACTS/PROCEDURAL HISTORY

This appeal stems from a hostage incident that occurred at CCS on July 19, 2004. Because CCS filed suit against the City based on its actions during this incident, we briefly recite the facts as background to the instant action.

On July 19, 2004, Jimmy Johnson (Johnson) fled from police after being stopped for an expired license plate. Johnson, who was armed, entered CCS and took Mrs. Saroj Patel (Mrs. Patel), a CCS employee, hostage. City police were dispatched to CCS. Major Doug Horton (Major Horton) of the City Public Safety Department was the first to arrive on the scene. Major Horton testified the initial plan was to try to talk to Johnson and encourage him to surrender. These negotiations proved unsuccessful. The police then cut off the building's power as well as introduced tear gas and pepper spray through the duct work. Despite the police's efforts over the course of the day to force Johnson to surrender, Johnson was unwilling to surrender.

The ability of police to see the interior of CCS was obscured because Johnson had taped cardboard over the windows that morning. In addition, CCS had only one front entrance, and the building contained no other windows or doors. Major Horton stated the lack of other viable entries and the presence of approximately 8,500 gallons of gasoline inside gas tanks in front of the building prompted the police to utilize a bulldozer to breach the walls of the cinder block building. Major Horton testified the police decided to use this strategy only after negotiation efforts proved futile, and they had exhausted all other less invasive remedies.

After a twelve-hour standoff, the police attempted to breach the left corner of the building with a bulldozer. At this point, Johnson, who was with Mrs. Patel in the main area of CCS, began shooting at the police. Johnson

then fled with Mrs. Patel into the store's walk-in cooler. Because the police's vision was obstructed, the police decided to use the bulldozer to breach the right front corner of the building where they believed Johnson and Mrs. Patel were located. With the demolition of the wall, Johnson and Mrs. Patel were visible, and a sharpshooter shot Johnson in the right shoulder as he and Mrs. Patel were struggling for Johnson's gun. Johnson held Mrs. Patel hostage in CCS for more than thirteen hours before the standoff ended. Mrs. Patel was unharmed, and Johnson was arrested.

During that process, the police's actions caused structural damage and other economic loss to CCS. As a result, CCS filed suit against the City alleging inverse condemnation and negligence. The City filed a motion for summary judgment on both causes of action, and the circuit court held a hearing on the City's motion on November 3, 2009. The circuit court orally granted the City's motion for the inverse condemnation claim and denied the City's motion for the negligence claim. The negligence claim was then tried before a jury the week of November 16, 2009, and after a four-day trial, the jury returned a verdict in favor of the City. The circuit court issued a formal order on November 30, 2009, granting summary judgment on CCS's inverse condemnation claim and holding the damage to the property did not constitute a "taking" that would entitle CCS to compensation under an inverse condemnation theory. This appeal followed.

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP." Boyd v. BellSouth Tel. Tel. Co., 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). "Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Id. To determine whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Id.

LAW/ANALYSIS

CCS contends the circuit court erred in granting the City's motion for summary judgment on CCS's inverse condemnation claim. We disagree.

The South Carolina Constitution provides, "[e]xcept as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C. Const. art. I, § 13(A). In an inverse condemnation action, a private property owner seeks to establish that a government entity has taken his or her property. Hilton Head Auto., LLC v. S.C. Dep't of Transp., 394 S.C. 27, 30, 714 S.E.2d 308, 310 (2011). Inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property. Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). A plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking. Hardin v. S.C. Dep't of Transp., 371 S.C. 598, 604, 641 S.E.2d 437, 443 (2007).

In this case, CCS claims the City's use of a bulldozer to tear down CCS's building was an affirmative, aggressive act that constituted a physical taking of CCS's property, thereby entitling CCS to just compensation. We find the City's actions do not constitute a taking as contemplated under our Constitution or South Carolina case law.

First, the City did not physically appropriate the property for public use. See Carolina Chloride, Inc. v. S.C. Dep't of Transp., 391 S.C. 429, 435, 706 S.E.2d 501, 504 (2011) (holding the elements of an action for inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct amounts to a taking; and (3) the taking is for a public use). CCS maintained title to and possession of the property at all relevant times, and while the City's actions caused damage to CCS's property, no physical appropriation occurred. Moreover, the fact that the crime and the City's

ensuing actions occurred on CCS's property is insufficient to show the City appropriated the property for public use.

We find the City's actions in this instance are more properly categorized as a legitimate exercise of its police power. Police power, "[a]lthough not clearly defined . . . is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and, in its widest sense, is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights." City Council of Charleston v. Werner, 38 S.C. 488, 495, 17 S.E. 33, 35 (1893). A detriment to private property that results from a legitimate exercise of police power does not constitute a taking of private property for public use. See Richards v. City of Columbia, 227 S.C. 538, 547-48, 88 S.E.2d 683, 687 (1955) (finding city's ordinance that caused financial loss to property owners was a legitimate exercise of police power as distinguished from a taking of their property for public use); see also Edens v. City of Columbia, 228 S.C. 563, 571, 91 S.E.2d 280, 282 (1956) (holding eminent domain and police powers are not the same; just compensation must be made in government's exercise of eminent domain but not for loss of property from exercise of police power); Arnold v. City of Spartanburg, 201 S.C. 523, 538, 23 S.E.2d 735, 741 (1943) ("[T]he law will never, by any construction, advance a private interest to the destruction of a public interest; but, on the contrary, [] it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one."). Under these facts, we find an inverse condemnation claim was not the proper avenue of recourse for any damage caused by the City's actions.

We find support for this conclusion from other states as well. In a factually similar case, the California Supreme Court found a convenience store owner could not bring an inverse condemnation against the City of Sacramento for property damage caused by its police officers in an effort to apprehend a fleeing suspect who had taken refuge in the convenience store. Customer Co. v. City of Sacramento, 895 P.2d 900, 901 (Cal. 1995). The court concluded the convenience store could not bring an inverse

condemnation action to recover damages caused by the police's firing of tear gas into the store. Id. The court stated,

> Although the requirement of 'just compensation' has been extended, in limited circumstances—beyond its traditional context involving the taking or damaging of private property in connection with public improvement projects—to encompass government regulations that constitute the functional equivalent of an exercise of eminent domain, [it] . . . never has been applied to require a public entity to compensate a property owner for property damage resulting from the efforts of law enforcement officers to enforce the criminal laws.

Id. at 905-06.

The California Supreme Court noted the public policy implications from its decision as well. The court went on to hold,

> In the same manner, law enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally mandated liability for resulting damage to private property and by the ensuing potential for disciplinary action. This court never has sanctioned an action for inverse condemnation seeking recovery for incidental damage to private property caused by law enforcement officers in the course of efforts to enforce the criminal law. Permitting [the plaintiff] to bring an action for inverse condemnation under the circumstances of the present case would constitute a significant, unprecedented, and unwarranted expansion of the scope of the just compensation requirement and might well deter law enforcement officers from

> acting swiftly and effectively to protect public safety in emergency situations.

Id. at 910-11. Moreover, the majority of states considering this issue have determined a property owner cannot bring an inverse condemnation action against the government for destruction or damage to private property caused by police actions in attempting to enforce criminal laws. See e.g., Certain Interested Underwriters at Lloyd's London Subscribing to Certificate No. TPCLDP217477 v. City of St. Petersburg, 864 So.2d 1145, 1148 (Fla. Dist. Ct. App. 2003) (finding damage to apartment caused by police's use of "flash-bang" grenades in executing a search warrant did not constitute a taking under just compensation clause and any recovery for damages was only available under state tort law); McCoy v. Sanders, 148 S.E.2d 902, 905-06 (Ga. 1966) (holding damage to private property caused during a search for a missing person was a legitimate exercise of police power, thereby precluding inverse condemnation claim); Indiana State Police v. May, 469 N.E.2d 1183, 1184 (Ind. Ct. App. 1984) (finding the only remedy for damage caused to private property after tear gas was fired into home to capture a suspect was under state tort law, not as an action for inverse condemnation); Kelley v. Story Cnty. Sheriff, 611 N.W.2d 475, 482 (Iowa 2000) (holding damage to residence when executing an arrest warrant was the result of a reasonable exercise of police power rather than eminent domain so that no viable cause of action for inverse condemnation existed); Sullivant v. City of Oklahoma City, 940 P.2d 220, 226 (Okla. 1997) (holding situations involving police action that caused incidental or consequential property damage were properly classified as an exercise of police power as opposed to eminent domain because intent was to execute a warrant or undertake other police activity, not to take private property and convert it to public use); Brutsche v. City of Kent, 193 P.3d 110, 121 (Wash. 2008) (holding the use of a battering ram to gain entry to execute a search warrant did not constitute a taking).

Because CCS failed to demonstrate any facts or evidence that would entitle them to relief under an inverse condemnation theory, we hold the

circuit court properly granted the City's motion for summary judgment on CCS's inverse condemnation claim.[1]

CONCLUSION

Based on the foregoing, the circuit court's grant of summary judgment on CCS's inverse condemnation claim is

AFFIRMED.

THOMAS and LOCKEMY, JJ., concur.

[1] We also note the just compensation clause of the Constitution requires "just compensation be[] first made for the property." S.C. Const. art. I, § 13(A) (emphasis added). A plain reading demonstrates the drafters intended any governmental taking of a person's property under the eminent domain power to be one where the government pays for its use of the private property prior to taking it for public use. We do not believe the drafters intended to compensate private property owners for property damage under this clause for police action taken to protect the public and enforce criminal laws.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Burkey, Respondent,

v.

Peter Jay Noce, Melinda Noce, DDLabs, Inc., AvVenta Worldwide, Inc., AvVenta Worldwide, S.A., AvVenta Holdings, LLC, and Wild Dunes Investments, Appellants.

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 4971
Submitted April 2, 2012 – Filed May 9, 2012

APPEAL DISMISSED

John S. Wilkerson, III, Nosizi Ralephata, and Sean A. O'Connor, all of Charleston, R. Hawthorne Barrett, of Columbia, and Jeffrey L. Squires, of Washington, D.C., for Appellants.

Allan R. Holmes, A. Riley Holmes, Jr., and Timothy O. Lewis, all of Charleston, for Respondent.

PER CURIAM: Peter Noce, Melinda Noce, DDLabs, Inc., AvVenta Worldwide, Inc., AvVenta Worldwide, S.A., AvVenta Holdings, LLC, and Wild Dunes Investments (Appellants) appeal an order of the circuit court denying their motion to dismiss for forum non conveniens. We dismiss[1] the appeal as not immediately appealable.

FACTS

Appellants employed William Burkey in Costa Rica pursuant to an Employment and Confidentiality Agreement, from November 15, 2005, through December 31, 2008. Burkey sued Appellants in the Charleston County Court of Common Pleas, alleging the following causes of action: breach of contract, fraudulent breach of contract accompanied by fraudulent act, defamation, breach of employment contract in violation of clear mandate of public policy, South Carolina Payment of Wages Act, and declaratory relief invalidating unlawful and unenforceable covenant. Appellants filed a motion to dismiss the complaint pursuant to principles of forum non conveniens and multiple Rule 12(b), SCRCP, grounds. The circuit court held a motions hearing on the matters. The circuit court subsequently denied all motions to dismiss in a written order.[2] This appeal followed.

LAW/ANALYSIS

Section 14-3-330 of the South Carolina Code (1977 & Supp. 2011) limits this court's ability to hear appeals. Only final judgments and certain interlocutory orders are appealable. Id. An interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right. Id. While no South Carolina case law concerns the immediate appealability of a denial of dismissal based specifically on forum non conveniens, our courts have ruled on the appealability of other denials of motions to dismiss. Generally, the denial of a motion to dismiss under Rule 12(b)(6), SCRCP, is not immediately appealable. Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995). "[T]he denial of a motion to

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Appellants are only appealing the denial of the motion to dismiss on the ground of forum non conveniens.

dismiss [based on statute of limitations] is not directly appealable . . . ." McLendon v. S.C. Dep't of Highways & Pub. Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994). An order denying a motion to dismiss for lack of subject matter jurisdiction is also not directly appealable. Allison v. W.L. Gore & Assocs., 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). Additionally, an order denying a motion to change venue is not immediately appealable. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 95, 529 S.E.2d 11, 14 (2000).

Moreover, the United States Supreme Court has expressly ruled that federal court litigants cannot immediately appeal the denial of a motion to dismiss based on forum non conveniens. Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988). In Van Cauwenberghe, the petitioner argued the district court's order denying his motion to dismiss on the ground of forum non conveniens fell within the collateral order doctrine, and thus, was immediately appealable. Id. The Supreme Court held that the question of the convenience of the forum is not "completely separate from the merits of the action," and thus, is not immediately appealable as of right. Id. (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)). Additionally, other courts have addressed the issue and have held the denial of a motion to dismiss on the basis of forum non conveniens is not immediately appealable. See King v. Cessna Aircraft Co., 562 F.3d 1374, 1378-81 (11th Cir. 2009) (finding the denial of a motion to dismiss on the basis of forum non conveniens is not a final, appealable order); Rosenstein v. Merrell Dow Pharm., Inc., 769 F.2d 352, 354 (6th Cir. 1985) (holding the denial of a motion to dismiss on forum non conveniens grounds is not immediately appealable under collateral order exception to final judgment rule); Rolinski v. Lewis, 828 A.2d 739, 742 (D.C. 2003) (holding that denials of forum non conveniens motions to dismiss are not immediately appealable as of right); Payton-Henderson v. Evans, 949 A.2d 654, 662 (Md. Ct. Spec. App. 2008) (stating forum non conveniens issues are treated the same as change of venue and the denial of either is not immediately appealable). After a careful analysis of section 14-3-330 and the authority cited herein, we find the denial

of Appellants' motion to dismiss based on forum non conveniens is not immediately appealable.[3]

CONCLUSION

For the foregoing reasons, the appeal is

DISMISSED.

PIEPER, KONDUROS, and GEATHERS, JJ., concur.

[3] In light of our disposition herein, we decline to address Appellants' remaining arguments. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).